Part 1 The Legal Environment of Business CHAPTER 4 Administrative Law Page 65 CASE OPENER Does the EPA Have an Obligation to Regulate Automobile Emissions? On October 20, 1999, a group of 19 private organizations filed a rule-making petition asking the Environmental Protection Agency (EPA) to regulate “greenhouse gas emissions from new motor vehicles” under the Clean Air Act.1 The petitioners cited the fact that 1998 was the “warmest year on record,” that greenhouse gas emissions have significantly accelerated climate change, and that carbon dioxide is the most important man-made contribution to climate change. Fifteen months after the petition was filed, the EPA requested public comment on the issues. Then, on September 8, 2003, the EPA entered an order denying the rule-making petition, citing two reasons: (1) The Clean Air Act does not authorize the EPA to issue mandatory regulations to address global climate change; and (2) even if the agency had authority, it would be unwise to do so at this time. The case, Massachusetts v. EPA, eventually worked its way up to the U.S. Supreme Court, which had to decide whether the EPA was improperly failing to regulate carbon dioxide gas in automobile exhaust as a climate-changing pollutant. What government entity is the final determiner of whether a particular type of rule will be issued by an agency? Did the EPA err in not regulating greenhouse gases under the Clean Air Act? LEARNING OBJECTIVES LO 4-1 Define administrative law. LO 4-2 Define administrative agency. LO 4-3 Describe the enabling legislation powers that are granted to agencies. LO 4-4 Identify the types of powers administrative agencies have. LO 4-5 Differentiate between executive and independent agencies. LO 4-6 Define Administrative Procedures Act. LO 4-7 Distinguish between formal, informal, and hybrid rule making. LO 4-8 List the four limits on agency power.

Introduction to Administrative Law What is Administrative Law LO 4-1 Define administrative law. Page 66 As a business owner or manager, you will need to be aware of regulations that affect your business. In addition to learning about laws passed by Congress, you will also need to know about rules passed by administrative agencies. Administrative law consists of the substantive and procedural rules created by administrative agencies (bodies of the city, county, state, or federal government), involving applications, licenses, permits, available information, hearings, appeals, and decision making. LO 4-2 Define administrative agency. An administrative agency is generally defined as any body created by the legislative branch (e.g., Congress, a state legislature, or a city council) to carry out specific duties. Agencies have three types of power: legislative, judicial, and executive. They

may make rules for an entire industry, adjudicate individual cases, and investigate corporate misconduct. Because legislative, judicial, and executive powers have traditionally been placed in separate branches of government by the Constitution, the role of administrative agencies has led some to refer to agencies as the unofficial fourth branch of government. Although there is a semblance of truth to that characterization, administrative agencies are not in fact another branch, primarily because all their authority is simply delegated to them, and they remain under the control of the three traditional branches of government. The first federal administrative agency, the Interstate Commerce Commission (ICC), was created by Congress near the end of the nineteenth century. Congress felt that the anticompetitive conduct of railroads could best be controlled by a regulatory body. The ICC no longer exists as a separate agency,2 but for more than 100 years, the ICC regulated passenger and freight transportation. Following the crash of the stock market and the Great Depression of the 1930s, Congress saw a need for additional agencies to regulate business in the public interest. Since then, numerous agencies have been created whenever Congress believed an area required more intense regulation than Congress could provide. In fact, after the Enron scandal, there was talk that Congress might create a new agency to regulate the accounting industry. To date, no such agency has materialized. Why and How are Agencies Created? LO 4-3 Describe the enabling legislation powers that are granted to agencies. When Congress sees a problem that it believes needs regulation, it may create an administrative agency to deal with that problem. The idea is that the agency can be staffed with people who have special expertise in the area the agency is regulating and therefore know what types of regulations are necessary to protect the citizens in that area. Agencies typically act more swiftly than Congress in creating and enacting new laws. Today, administrative agencies actually create more rules than Congress and the courts combined. Congress creates administrative agencies through passage of enabling legislation, which is a statute that specifies the name, functions, and specific powers of the administrative agency. Enabling statutes grant agencies broad powers for the purpose of serving the “public interest, convenience, and necessity.” These broad powers include rule making, investigation, and adjudication. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? In the opening case, the EPA believed it did not have enough power to make rules regarding global climate change. Let’s say that a member of the EPA argued that only Congress has the power to make this type of regulation, which would directly affect the way many businesses operate. Would the EPA member be correct? LO 4-4 Identify the types of powers administrative agencies have.

Rule Making Enabling statutes permit administrative agencies to issue rules that control individual and business behavior. These rules have the same effect as laws. If an individual or business fails to comply with agency rules, there are often civil, as well as criminal, penalties. Agencies may enact three types of rules: procedural, interpretive, and legislative. Procedural rules are rules regarding the internal operations of an agency. Interpretive rules are rules that explain how the agency views the meaning of the statutes for which the agency has administrative responsibility. Finally, legislative rules are policy expressions that have the effect of law. The various rule-making processes are discussed later in this chapter. Investigation Enabling statutes grant executive power to agencies to investigate potential violations of rules or statutes. Many times, companies cooperate with agencies and voluntarily furnish information. Other times, however, agencies must use their investigative powers, defined in their enabling legislation, to gather information. Such powers typically include the power to issue a subpoena (i.e., an order to appear at a particular time and place and provide testimony) and a subpoena duces tecum (i.e., an order to appear and bring specified documents). For more on the investigatory powers given to administrative agencies, see Case 4-1. CASE 4-1 DOE v. UNITED STATES SEC U.S. District Court for the Northern District of California U.S. Dist. Lexis 114382 (2011) FACTS: The administrative subpoena at issue seeks to discover the identity of the owner of the email address "aurorapartners@gmail.com," which the SEC has reason to believe may have been used to tout stock for Jammin Java Corp. as part of a "pump and dump" scheme. "Pump and dump" schemes generally involve the touting of a company's stock (typically microcap companies) through false and misleading statements to the marketplace. After pumping the stock, fraudsters make huge profits by selling their cheap stock into the market. The SEC is investigating a rapid increase in Jammin Java's price, which coincided with the wide dissemination of online newsletters touting its stock. The SEC is investigating the online newsletters to determine whether they contained materially false information about Jammin Java, and/or failed to disclose the disseminator's financial interest in the company or compensation the company paid them. The SEC represents that it "has obtained information indicating that an individual using the email address 'aurorapartners@gmail.com' may be involved in the touting activity at issue in the investigation." Pursuant to its investigative powers and the Electronic Communications Privacy Act (ECPA), the SEC served an administrative subpoena on Google seeking the identity and contact information of the owner of the email address "aurorapartners@gmail.com." Google gave the

owner of the email address notice of the subpoena, the owner hired counsel, and counsel moved to quash the subpoena. ISSUE: May an agency investigating possible violation of agency rules obtain the identity and contact information of the owner of an email address? REASONING: The ECPA requires “a provider of electronic communication service or remote computing device” to “disclose to a governmental entity the (A) name; (B) address; (C) local and long distance telephone connection records, or records of session times and durations; (D) length of service . . . and types of service utilized; (E) telephone or instrument number or other subscriber number or identity . . .; and (F) means and source of payment for such service, of a subscriber when the governmental entity uses an administrative subpoena authorized by Federal or State statute. . . .” There is no provision in the ECPA allowing a customer whose non-content records are being sought to prevent disclosure, although where the governmental entity is seeking the contents of customer communications, customers may challenge disclosure. Movant argues the subpoena should be quashed because disclosure of his identity would violate his right to anonymous speech, which is protected by the First Amendment to the United States Constitution. Movant has used the email address “to speak anonymously on the Internet. Specifically, I use the email address to post my opinions on various political blogs, including about the policies of specific members of the U.S. Congress. I have made these political statements under the belief that my anonymity will be protected.” The SEC directs the Court to Brock v. Local 375, Plumbers Int’l Union of America. . . for the uncontroversial proposition that administrative agencies may investigate on the mere suspicion the law is being violated. Brock sets out the three-part standard of review courts in the Ninth Circuit apply in an agency subpoena enforcement proceeding: (1) Has Congress granted the agency the authority to investigate; (2) have procedural requirements been followed; and (3) is the information sought relevant and material to the investigation? Brock recognizes that First Amendment protections may apply to information sought by an administrative subpoena and provides that where a party opposing disclosure makes a prima facie showing of arguable First Amendment infringement, the burden will shift to the government to show the information sought is rationally related to a compelling governmental interest and the subpoena is the “least restrictive means of obtaining the desired information.” Movant contends the Brock test does not apply here because a “more rigorous standard” applies to anonymous speech cases than to cases involving the right to free association at issue in Brock. Movant’s argument relies exclusively on cases analyzing standards for disclosure in civil actions involving private parties embroiled in discovery

disputes—not cases balancing the needs of a legitimate government investigation with the interest of a party wishing to remain anonymous. Congress recognizes the need for government agencies to investigate wrongdoing and accordingly has granted these agencies investigatory powers that are not available to civil parties. The ECPA, for example, allows government agencies like the SEC to issue administrative subpoenas requesting information from ISPs or to obtain court orders compelling disclosure of subscriber information. DECISION AND REMEDY: Movant has not established that his addressing information is protected under the First Amendment, and the SEC sufficiently has established that the ownership of the email address “aurorapartners@gmail.com” is relevant to the Jammin Java investigation. Accordingly, the motion to quash the subpoena directed at Google requesting this information is denied. Affirmed, and respondent recovered the costs of her appeal. SIGNIFICANCE OF THE CASE: Administrative agencies have broad investigative powers that are not available to parties in civil cases. CRITICAL THINKING As we see again and again, the meaning of key words will often push a decision in a particular direction. How could the distinction between subpoenas requesting identity and those requesting content be made more clear in this case? ETHICAL DECISION MAKING Do you believe it is ethical to engage in anonymous online postings that are critical of others and/or their organizations? If so, is the golden rule obsolete? In other words, if you are okay with anonymous postings about others, would you be okay if someone anonymously criticized you online? Page 68 Adjudication Enabling statutes delegate judicial power to agencies to settle or adjudicate individual disputes that an agency may have with businesses or individuals. After investigation, the agency holds an administrative hearing before an administrative law judge (ALJ). The ALJ will try to convince the parties to reach a settlement via a consent order, but the judge also has the authority to render a binding decision (an order) after a hearing (administrative law matters are heard only by an ALJ because there is no right to a jury trial in administrative agencies). An appeal to the full commission or the head of an agency may then be filed. That decision may be appealed to the circuit court of appeals. If there are no appeals, the ALJ’s initial order becomes the final order. Decisions of ALJs are typically upheld. Page 69 Example of an Administrative Problem. The EPA administrator, using the congressional mandate under the Clean Air Act, sets forth rules governing the amount of certain hazardous air pollutants that may be emitted into the atmosphere. Using these standards, another branch of the EPA sends investigators to inspect a plant suspected of violating the act. If the inspector finds a violation and the EPA imposes a penalty, the plant

operator will most likely contest the imposition of the fine, and a hearing will be held before an ALJ employed in another division of the EPA. If the matter is not settled at the hearing, the ALJ will preside over another hearing and render a binding order. That order may be appealed within the agency and finally to the federal court. The courts, however, typically defer to the expertise of the agency and the associated ALJ. In other words, most orders by an ALJ are upheld.

Types of Administrative Agencies Agencies are classified as either executive or independent. The administrative head of an executive agency is appointed by the president with the advice and consent of the U.S. Senate. Executive-agency heads may be discharged by the president at any time, for any reason. When a new president is elected, he will typically place his appointees in charge of executive agencies. These agencies are generally located within the executive branch, under one of the cabinet-level departments. Hence, executive agencies are referred to as cabinet-level agencies. Examples of traditional executive agencies are the Federal Aviation Agency (FAA), located within the Department of Transportation, and the Food and Drug Administration (FDA), located within the Department of Health and Human Services. Independent agencies are governed by a board of commissioners, one of whom is the chair. The president appoints the commissioners of independent agencies with the advice and consent of the Senate, but these commissioners serve fixed terms and cannot be removed except for cause. No more than a simple majority of an independent agency can be members of any single political party (e.g., if the board consists of seven members, no more than four may be from the same political party). Serving fixed terms is said to make the commissioners less accountable to the will of the executive (thus the term independent agency). These agencies are generally not located within any department. Examples of independent agencies are the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC), and the Federal Communications Commission (FCC). LO 4-5 Differentiate between executive and independent agencies. Another difference between these two types of agencies is the scope of their regulatory authority. Executive agencies tend to have responsibility for making rules covering a broad spectrum of industries and activities. Independent agencies, often called commissions, tend to have more narrow authority over many facets of a particular industry, focusing on such

activities as rate making and licensing. Executive agencies have a tendency to focus more on social regulation, whereas independent agencies are more often focused on what we refer to as economic regulation. Federal and State Administrative Agencies Currently, more than 100 federal agencies are in operation, as well as countless state agencies. Often, when there is a federal agency, there are also comparable state agencies to which the federal agency delegates much of its work. For example, the most important federal agency affecting environmental matters is the Environmental Protection Agency (EPA). Every state has a state environmental protection agency to which the federal EPA delegates primary authority for enforcing environmental protection laws. However, if at any time the state agency fails to enforce these laws, the federal EPA will step in to enforce them. Exhibit 4-1 lists the major administrative agencies. Exhibit 4-1Major Administrative Agencies INDEPENDENT AGENCIES EXECUTIVE AGENCIES Central Intelligence Agency (CIA) Drug Enforcement Administration (DEA) Consumer Product Safety Commission (CPSC) Federal Aviation Administration (FAA) Equal Employment Opportunity Commission (EEOC) Federal Bureau of Investigation (FBI) Federal Communications Commission (FCC) Food and Drug Administration (FDA) Federal Trade Commission (FTC) Internal Revenue Service (IRS) National Labor Relations Board (NLRB) International Trade Association (ITA) Small Business Administration (SBA) National Park Service (NPS) Social Security Administration (SSC) Veterans Benefits Administration (VBA) Source: https://www.usa.gov/federal-agencies. LO 4-6 Define Administrative Procedures Act. Page 70 Some agencies do not fall clearly into one classification or the other. These agencies are typically referred to as hybrid agencies. Created as one type of agency, the body may share characteristics of the other. The EPA, for example, was created as an independent agency, not located within any department of the executive branch. Yet it is headed by a single administrator who serves at the whim of the president. During the early 1990s, in fact, there were discussions of the need to transform the EPA into a cabinet-level executive agency. (These initiatives did not get beyond the discussion stage.) Another example is the “independent” Federal Energy Regulation Commission (FERC), which has the typical structure of an independent agency yet is located within the Department of Energy.

How Do Agencies Operate? In 1946, Congress passed the Administrative Procedures Act (APA) as a major limitation on how agencies are run. Prior to passage of the APA, agencies could decide on their own how to make rules,

conduct investigations, and hold hearings and trials. Under the APA, there are very specific guidelines on rule making by agencies. The two most common types of rule making are informal and formal; a third type is known as hybrid. Each is discussed below, along with a few exemptions. Informal Rule Making LO 4-7 Distinguish between formal, informal, and hybrid rule making. The primary type of rule making administrative agencies use is informal rule making, or notice-and-comment rule making. Informal rule making applies in all situations in which the agency's enabling legislation or other congressional directives do not require another form. An agency initiates informal rule making by publishing the proposed rule in the Federal Register, along with an explanation of the legal authority for issuing the rule and a description of how the public can participate in the rule-making process. The Federal Register is the official daily publication for rules, proposed rules, and notices of federal agencies and organizations, as well as executive orders and other presidential documents.3 Page 71 After publication, opportunity is provided for all interested parties to submit written comments. The comments may contain data, arguments, or other information a person believes might influence the agency in its decision making. Although the agency is not required to hold hearings, it has the discretion to receive oral testimony if it wishes to do so. Although the agency is not required to respond to all comments it receives, it is required to respond to comments that significantly concern the proposed rule. After considering the comments, the agency may alter the rule. It publishes the final rule, with a statement of its basis and purpose, in the Federal Register. This publication also includes the date on which the rule becomes effective, which must be at least 30 days after publication. Informal rule making is most often used because it is more efficient for the agency in terms of time and cost. No formal public hearing is required, and no formal record needs to be established. Some people believe that informal rule making is unfair because parties who are interested in the proposed rule have no idea what types of evidence the agency has received from other sources with respect to that rule. Thus, if the agency is relying on what one party might perceive as flawed or biased data, that party has no way to challenge that data. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Let's say, in the Case Opener, that the EPA decides it would like to make a rule governing the carbon dioxide emissions of new vehicles. The EPA publishes the rule in the Federal Register along with an explanation of the legal authority of the rule. Is this enough information for the Federal Register? What is the missing third prong? Formal Rule Making The APA requires formal rule making when an enabling statute or other legislation

mandates all regulations or rules to be enacted by an agency as part of a formal hearing process that includes a complete transcript. The first step in formal rule making is publication in the Federal Register of a notice of proposed rule making by the agency. The second step is a public hearing at which witnesses give testimony on the pros and cons of the proposed rule and are subject to cross-examination. An official transcript of the hearing is kept. On the basis of information received at the hearing, the agency makes and publishes formal findings. On the basis of these findings, an agency may or may not promulgate a regulation. If a regulation is adopted, the final rule is published in the Federal Register. Because of the expense and time involved in obtaining a formal transcript and record, most enabling statutes do not require a formal rule-making procedure when promulgating regulations. If a statute is drafted in a manner that is at all ambiguous with respect to the type of rule making required, the court will not interpret the law as requiring formal rule making. In the following case, the court had to determine whether an agency effectively may suspend a duly promulgated regulation without observing the procedures or identifying relevant factual criteria that the law requires to effect such a change. CASE Nugget Notice and Comment Rule Making Open Communities Alliance v. Carson 2017 U.S. Dist. LEXIS 21131 (2017) Section 8 of the Fair Housing Act of 1968 serves two statutory purposes: (1) aiding low-income families in obtaining a decent place to live and (2) promoting economically mixed housing. This case, however, is not about what is good housing policy. This case is about the rule of law—whether an agency effectively may suspend a duly promulgated regulation without observing the procedures or identifying relevant factual criteria that the law requires to effect such a change. The U.S. Department of Housing and Urban Development (HUD), without notice and comment or any evidence, delayed almost entirely by two years implementation of a rule requiring local Public Housing Authorities in 24 metropolitan areas, to calculate housing vouchers' values based on local, rather than metropolitan-wide, prevailing market rents. HUD argued that the Secretary had broad authority to delay the regulation's implementation wholesale whenever the Secretary determines he has reason to do so. The plaintiffs are two African-American women living in metropolitan areas the Rule would affect, as well as Open Communities Alliance ("OCA"), a nonprofit organization devoted to providing social and economic opportunities for low-income people. Plaintiff Crystal Carter is a voucher holder who would like to move from Hartford, Connecticut, to nearby Simsbury, Connecticut, to be near her children's schools and to provide her family a safer home and better opportunities. Plaintiff Tiara Moore would like to move from Chicago, Illinois, to the high-

opportunity area of DuPage County, Illinois, to provide a safer neighborhood and better opportunities for her daughter. Not only does DuPage County have better schools than Chicago, Ms. Moore’s mother lives in DuPage County and could provide childcare while Ms. Moore works. Neither plaintiff can afford to move without implementation of the rule. The plaintiffs sought a preliminary injunction to require HUD to implement the rule on its effective date of January 1, 2018. The court granted the preliminary injunction, holding that HUD’s suspension of the rule was done without proper notice and comment procedure, did not meet any of the three exceptions to the requirement of notice and comment, and that the action was arbitrary and capricious. Page 72 Hybrid Rule Making After agencies began regularly making rules in accordance with the appropriate procedures, the flaws of each type of rule making became increasingly apparent. In response to these problems, a form of hybrid rule making became acceptable to the courts and legislature. Hybrid rule making is an attempt to combine the best features of both formal and informal rule making. The starting point, publication in the Federal Register, is the same. Publication is followed by the opportunity for submission of written comments, and then there is an informal public hearing with a more restricted opportunity for cross-examination than that in formal rule making. The publication of the final rule is done in the same manner as for other forms of rule making. Exhibit 4-2 compares formal, informal, and hybrid rule-making procedures. Exhibit 4-2Rule-Making Procedures Table Summary: A table with 2 columns titled procedure and types of rulings. Column 2 has 3 sub columns for formal, informal and hybrid. Type of Rule Making PROCEDURE FORMAL INFORMAL HYBRID Public hearing Yes No Yes Formal record Yes No No Publication of proposed rule in Federal Register Yes Yes Yes Written comments from the public and interested parties Yes Yes Yes Oral testimony and cross-examination Yes No (agency discretion) Yes (limited) Publication of final rule in Federal Register Yes Yes Yes Exempted Rule Making Page 73 The APA contains an exemption from rule making that allows an agency to decide whether public participation will be allowed. Exemptions include rule-making proceedings with regard to “military or foreign affairs” and “agency management or personnel.” Exemptions are also granted for rule-making proceedings relating to “public property, loans, grants, benefits, or contracts” of an agency. Military and foreign affairs often need speed and secrecy, which are incompatible with public notice and hearings. Other exemptions are becoming more difficult to justify in the eyes of the courts unless they meet one of the exemptions of the Freedom of Information Act (discussed later in this chapter). Also exempted from the rule-making procedures are interpretive rules and general policy statements.

An interpretive rule is a rule that does not create any new rights or duties but is merely a detailed statement of the agency's interpretation of an existing law. Interpretive rules are generally very detailed, step-by-step statements of what actions a party is to take to be considered in compliance with an existing law. Policy statements are general statements about the directions in which an agency intends to proceed with respect to its rule-making or enforcement activities. Again, these statements have no binding impact on anyone; they do not directly affect anyone's legal rights or responsibilities. A final exemption applies when public notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest." This exemption is used most commonly either when the issue is so trivial that there would probably be very little, if any, public input, or when the nature of the rule necessitates immediate action. Whenever an agency chooses to use this exemption, it must make a good-cause finding and include in its publication of the final rule a statement explaining why there was no public participation in the process. The following case demonstrates the broad powers given to agencies to investigate willful violations of agency rules. Regulated Negotiation The exceedingly high number of challenges to regulations, as well as a growing belief that structured bargaining among competing interest groups might be the most efficient way to develop rules, has stimulated interest among a number of agencies in a relatively new form of rule making, often referred to as reg-neg. Each concerned interest group and the agency itself sends a representative to bargaining sessions led by a mediator. After the parties achieve a consensus, that agreement is forwarded to the agency. The agency is then expected to publish the compromise as a proposed rule in the Federal Register and follow through with the appropriate rule-making procedures. The agency, however, is not bound to do so. If it does not agree with the proposal the group negotiated, the agency is free to try to promulgate a completely different rule or a modification of the one obtained through the negotiation. The reasoning behind reg-neg is similar to that supporting the increased use of mediation. If the parties can sit down and try to work out a compromise solution together, that solution is much more likely to be accepted than one handed down by some authority. The parties who hammered out the agreement now have a stake in making it work because they helped to create it. Admittedly, reg-neg is not possible in all situations. If there is an unmanageably large group of interests that would have to be represented, if any possible compromise would have to result from one group's backing away from a fundamental principle, or if two groups feel so antagonistic toward each other that they would be unable to sit down and talk rationally, reg-neg would probably not even be worth

trying. Problems Associated with Rule Making Agency employees are not subject to the same political pressures as legislators, but they are also not unbiased. Often the people with the necessary expertise to regulate specific areas come from the industry they will now be regulating. There is some concern that it will be difficult for regulators to ignore their past ties to industry and pass regulations that are in the public interest, especially when the regulations would increase costs to the industry or are opposed by the industry for other reasons. When people are discussing an agency in which they perceive this problem as existing, they often refer to the agency as being a captured agency. The counterargument is that those who have been deeply involved in an industry know it best. To prevent such actions during his administration, President Obama issued the Executive Order on Ethics Commitments by Executive Branch Personnel. The order prohibits executive-branch employees from accepting gifts from lobbyists; closes the revolving door that allowed government officials to move to and from private-sector jobs in ways that gave that sector undue influence over government; and requires government hiring to be based on qualifications, competence, and experience, not political connections.4 Regulators must be sensitive to the role the economy plays in the public's willingness to accept or support certain regulations. When the economy is flourishing and unemployment is low, there is much greater acceptance of regulations. When unemployment is high, people are much more reluctant to accept regulations that they believe might cause some workers to lose their jobs and/or cause the prices of products to rise. Page 74 Other Administrative Activities Agencies perform a variety of less well known but equally important tasks. These include advising, conducting research, issuing permits, and managing property. One of the most common situations in which individuals come into contact with agencies occurs when an agency advises businesses and individuals on whether the agency considers an activity legal or illegal. Agencies also conduct studies of industries and markets. For example, the FTC, OSHA, and FDA conduct studies to determine, respectively, the level of economic concentration, safety in the workplace, and safety of drugs. Also, agencies provide information to the general public on various matters through hotlines, publications, and seminars. Agencies also devote much of their time to issuing licenses or permits. The EPA, for example, helps protect the environment by requiring certain environmentally sound activities before granting permits. Local agencies are responsible for issuing liquor licenses and cabaret (dancing) permits to local bars and restaurants. Finally, agencies often are responsible for managing government property. Case 4-2 illustrates limitations on an agency's use of its powers to issue and, in this case, revoke

a driver’s license. CASE 4-2 YAN JU WANG v. GEORGE VALVERDE Court of Appeal of California, Second Appellate District 162 Cal. App. 4th 616 (2008) FACTS: The trial court granted plaintiff Wang’s petition for a writ of administrative mandate compelling the defendant, the Department of Motor Vehicles (DMV), to set aside its revocation of Wang’s class C driver’s license. On appeal, the DMV argued that, as a matter of law, it had the authority to revoke Wang’s class C license because it allegedly caught her cheating on an examination for a class B license. Wang, the holder of a valid class C (noncommercial) driver’s license, applied for a class B (commercial) driver’s license. She was given a written examination to determine whether she was qualified for a class B license, but she was not permitted to complete that examination because she was allegedly cheating while taking the examination by using crib notes. Wang was never criminally prosecuted for using crib notes, under Vehicle Code section 14610.5, because the DMV determined that there was insufficient evidence to support criminal action. The only administrative action taken against Wang by the DMV was to order the revocation of her class C (noncommercial) driver’s license. ISSUE: Does the Vehicle Code empower the state to revoke a driver’s license if the driver cheated on the test for a different driver’s license? REASONING: The DMV appealed the Appeals Court’s concurring opinion that “[n]o such action is authorized by the Vehicle Code.” The DMV argues that, as a matter of law, the DMV does have authority to revoke Wang’s class C license because it allegedly caught her cheating on the examination for a class B license. The DMV purports to derive that authority from the Vehicle Code as follows: (1) Section 13359 provides that the DMV “may suspend or revoke the privilege of any person to operate a motor vehicle upon any of the grounds which authorize the refusal to issue a license”; (2) section 12809, subdivision (d), provides that the DMV may refuse to issue a license to any person who has “committed any fraud in any application”; (3) an examination is part of an application; (4) the use of a crib sheet in taking an examination is a fraudulent act; so (5) by using the crib sheet, Wang committed a fraud in an application, which therefore authorized refusal to issue a class B license, which therefore authorized revocation of her class C license, because any ground for refusal to issue a license is also a ground for revocation of a license. The DMV’s argument thus depends upon the DMV’s contention that under section 13359, any ground for refusal to issue one license is also sufficient to justify revocation of a different license. The DMV cites no authority for its construction of section 13359. We have found no case on point, but we conclude that the DMV’s interpretation cannot be correct because it would lead to untenable results. In general, the DMV’s

interpretation of the statute would authorize revocation of a class C license held by any unsuccessful applicant for a class B license. The statutory requirements for a class B license, however, are more demanding than the statutory requirements for a class C license, so statutory ineligibility for a class B license has no tendency, in itself, to show lack of statutory entitlement to a class C license. . . . Because the DMV's interpretation of section 13359 turns every unsuccessful application for a class B license into an authorization to revoke the applicant's class C license, it effectively negates the lower statutory threshold for entitlement to a class C license. DECISION AND REMEDY: Affirmed, and respondent recovered the costs of her appeal. SIGNIFICANCE OF THE CASE: The administrative agency is limited to the powers provided in the statute governing its operations. CRITICAL THINKING What facts, had they existed, would have altered this decision? ETHICAL DECISION MAKING Who, besides the parties directly involved, have interests in the results of this decision? In other words, who are the stakeholders that an ethical manager should consider?

Limitations on Agency Powers Page 75 LO 4-8 List the four limits on agency power. There are four basic limits on agency power: political, statutory, judicial, and informational (see Exhibit 4-3). The hope is that these limitations will keep the agencies and their thousands of employees from abusing their discretion. Exhibit 4-3Limits on Agency Power TYPE OF LIMIT SPECIFIC LIMITATIONS Political The Senate must approve agency heads; Congress has power over agency budgets. Statutory Congress may create or eliminate agencies and amend enabling legislation (i.e., powers of agencies); Congress reviews and may override agency rules. Judicial Interested parties may challenge administrative rules in the courts, which may review the agency's finding of facts, its interpretation of the rule, and the scope of the agency's power in making the rule. Informational The Freedom of Information Act, Government in Sunshine Act, and Privacy Act of 1974 specify agencies' responsibilities regarding public access to information. Political Limitations Page 76As discussed earlier in this chapter, the president appoints the administrative heads of all executive agencies with the advice and consent of the Senate. If the president is unhappy with the head of such an agency, that person may be fired at any time for any (or no) reason. As such, executive agencies are particularly accountable to the executive branch. Moreover, the political slant (liberal or conservative) of the agency is

significantly influenced by the president. Congress also has significant control over agencies because the Senate must approve presidential nominees for them to become the administrative heads of agencies. Moreover, Congress has control over the budgets of all agencies. If Congress decides that a particular agency is not performing as it wishes, that agency's budget may be cut or even defunded. Just before the Enron crisis, Congress, after being heavily lobbied by the accounting industry, threatened to defund the Securities and Exchange Commission (SEC). In effect, Congress did not like the SEC's proposal that stock options should be charged as earnings. Arthur Levitt, then head of the SEC, heard the warning loud and clear and decided to walk away from his firmly held position. In later interviews, Levitt said it was his biggest regret as head of the SEC.5 Statutory Limitations Congress has the power to create or dissolve an agency. If Congress is unhappy with an agency, it may amend the agency's enabling legislation and limit the agency's power. Moreover, in 1996, legislation was signed into law that gives Congress 60 days to review proposed agency rules. Congress may override those rules before they become effective. In addition, the APA (passed by Congress in 1946) sets forth guidelines that all agencies must follow when engaged in rule making. Judicial Limitations An individual or business that believes itself harmed by an administrative rule may challenge that rule in federal court after all administrative procedures have been exhausted.6 This is probably the biggest constraint on agency power. If a rule is subjected to judicial review, the court will consider the following: The facts of the case: Courts typically defer to an agency's fact finding. The facts must be supported by substantial evidence. The agency's interpretation of the rule: Once again, the courts typically defer to the expertise of the agency and uphold the agency's interpretation of the rule. The scope of the agency's authority: Has the agency exceeded the authority granted it by its enabling legislation? Although we typically think of judicial limitations as reining in overly zealous administrative regulators, the Case Opener illustrates that sometimes the judiciary is called on to restrict inaction by an agency. In Massachusetts v. EPA, the agency had resisted regulating greenhouse gases, arguing that carbon dioxide and similar gases are not pollutants under the Clean Air Act and, therefore, that the agency had no power to regulate them. When the high court reviewed the legislative mandate, however, it held that U.S. motor-vehicle emissions make a "meaningful contribution to greenhouse gas concentrations" and hence to global warming—and therefore the agency did have the authority to regulate such gases as air pollutants under the Clean Air Act. In June 2009, the EPA granted a Clean Air Act waiver of preemption to California, allowing California to implement its own, more

stringent greenhouse gas emission standards for motor vehicles beginning with model year 2009. By mid-2010, with the agreement of the auto industry, the California standard became the federal standard.7 The National Labor Relations Board (NLRB) is an independent administrative agency (see Exhibit 4-1). As you read the following case, Northwestern University and College Athletes Players Association, are you convinced there is substantial evidence that student athletes should be treated as employees under the law? Moreover, when this administrative decision is appealed to the courts, should the courts defer to the NLRB's interpretation of what it means to be an "employee"? Page 77 CASE 4-3 NORTHWESTERN UNIVERSITY AND COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA) Case 13-RC-121359, National Labor Relations Boards (NLRB) (March 26, 2014) FACTS: Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended ("the Act"), a hearing was held before a hearing officer of the National Labor Relations Board ("the Board"). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to the undersigned its authority in this proceeding. The Employer [Northwestern University] is a private, nonprofit, nonsectarian, coeducational teaching university chartered by the State of Illinois, with three campuses, including one located in Evanston, Illinois. It currently has an undergraduate enrollment of about 8,400 students. . . . The Employer maintains an intercollegiate athletic program and is a member of the National Collegiate Athletic Association (NCAA). The NCAA is responsible for formulating and enforcing rules governing intercollegiate sports for participating colleges. The Employer is also a member of the Big Ten Conference, and its students compete against the other 11 member schools (as well as nonconference opponents) in various sports. There are currently 19 varsity sports, which the Employer's students can participate in at the Division I level, including 8 varsity sports for men and 11 varsity sports for women. In total, there are about 500 students who compete in one of these sports each year for the Employer. . . . As part of its athletic program, the Employer has a varsity football team that competes in games against other universities. The team is considered a Football Bowl Subdivision (FBS) Division I program. Since 2006, the head football coach has been Patrick Fitzgerald, Jr., and he has been successful in taking his team to five bowl games. His football staff comprises a Director of Football Operations, Director of Player Personnel, Director of Player Development, nine full-time assistant coaches, and four graduate assistant coaches who assist him with his various duties. There are also five full-time strength coaches, two full-time video staff employees, two administrative assistants, and various interns who report to him. In turn, Head Coach

Fitzgerald reports to Athletic Director James J. Phillips and President Dr. Morton Shapiro. The Employer's football team is composed of about 112 players of which there are 85 players who receive football grant-in-aid scholarships that pay for their tuition, fees, room, board, and books. The players on a scholarship typically receive grant-in-aid totaling $61,000 each academic year. . . . ISSUE: Under the Act, should student athletes who play football be deemed employees and given the legal right to bargain collectively? REASONING: A party seeking to exclude an otherwise eligible employee from the coverage of the Act bears the burden of establishing a justification for the exclusion. Accordingly, it was the Employer's burden to justify denying its scholarship football players employee status. I find that the Employer failed to carry its burden. Section 2(3) of the Act provides in relevant part that the "term 'employee' shall include any employee. . . ." The U.S. Supreme Court has held that in applying this broad definition of "employee," it is necessary to consider the common law definition of "employee." NLRB v. Town & Country Electric, 516 U.S. 85, 94 (1995). Under the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment. As a result, the Board has subsequently applied the common law test to determine whether individuals are indeed statutory employees. As the record demonstrates, players receiving scholarships to perform football-related services for the Employer under a contract for hire in return for compensation are subject to the Employer's control and are therefore employees within the meaning of the Act. Clearly, the Employer's players perform valuable services for their Employer. Monetarily, the Employer's football program generated revenues of approximately $235 million, during the nine-year period from 2003 to 2012 through its participation in the NCAA Division I and Big Ten Conference, that were generated through ticket sales, television contracts, merchandise sales, and licensing agreements. The Employer was able to use this economic benefit provided by the services of its football team in any manner it chose. Less quantifiable but also of great benefit to the Employer is the immeasurable positive impact to Northwestern's reputation a winning football team may have on alumni giving and increase in number of applicants for enrollment at the University. . . . Equally important, the type of compensation that is provided to the players is set forth in a tender that they are required to sign before the beginning of each period of the scholarship. This tender serves as an employment contract and gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them. Because NCAA rules do not permit

the players to receive any additional compensation or otherwise profit from their athletic ability and/or reputation, the scholarship players are truly dependent on their scholarships to pay for basic necessities, including food and shelter. . . . In the instant case, the record establishes that the players who receive scholarships are under strict and exacting control by their Employer throughout the entire year. . . . The coaches have control over nearly every aspect of the players' private lives because they must follow many rules under threat of discipline and/or the loss of a scholarship. The players have restrictions placed on them and/or have to obtain permission from the coaches before they can (1) make their living arrangements, (2) apply for outside employment, (3) drive personal vehicles, (4) travel off campus, (5) post items on the Internet, (6) speak to the media, (7) use alcohol and drugs, and (8) engage in gambling. The fact that some of these rules are put in place to protect the players and the Employer from running afoul of NCAA rules does not detract from the amount of control the coaches exert over the players' daily lives. . . . In sum, based on the entire record in this case, I find that the Employer's football players who receive scholarships fall squarely within the Act's broad definition of "employee" when one considers the common law definition of "employee." DECISION AND REMEDY: For the reasons discussed in detail below, I find that players receiving scholarships from the Employer are "employees" under Section 2(3) of the Act. Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following appropriate bargaining unit: Eligible to vote are all football players receiving football grant-in-aid scholarship and not having exhausted their playing eligibility employed by the Employer located at 1501 Central Street, Evanston, Illinois, but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act. Peter Sung Ohr, Regional Director National Labor Relations Board, Region 13 SIGNIFICANCE OF THE CASE: The case was appealed and on August 17, 2015 the NLRB unanimously decided as follows: "We conclude that asserting jurisdiction in this case would not serve to promote stability in labor relations. Our decision today is limited to the grant-in aid scholarship football players covered by the petition in this particular case." In a clear victory for the college sports establishment, the five-member board preserved, for now, one of the N.C.A.A.'s core principles: that college athletes are primarily students. CRITICAL THINKING There is extensive listing in this decision of the various aspects of the student athlete's life that are controlled by the coaching staff. What is the purpose of that listing as justification for the eventual decision? In other words, how does this listing shape the reasoning?

ETHICAL DECISION MAKING One of the groups of stakeholders who are often ignored in an ethical decision are future generations. Those of us alive now do not know the names of future generations, have by definition never met them, and consequently have a difficult time considering them relevant when we make a decision even when these people are going to be affected in major ways by the decision. What groups of people in future generations will be affected by this decision? How will they be affected? Informational Limitations Page 78 Agency power is limited by the Freedom of Information Act (FOIA), the Government in Sunshine Act, and the Privacy Act of 1974. Freedom of Information Act The Freedom of Information Act (FOIA), passed in 1966, requires federal agencies to publish in the Federal Register places where the public can get information from the agencies. The act requires similar publication of proposed rules and policy statements. It requires agencies to make such items as staff manuals and interpretations of policies available for copying to individuals, on request. Finally, all federal government agencies must publish records electronically. Page 79Any individual or business may make a FOIA request to a federal government agency. Information may be obtained regarding how the agency gets and spends its money. Statistics and/or information collected by the agency on a given topic are also available. Perhaps most important, citizens are entitled to any records that the government has about them. For example, you could contact the Internal Revenue Service (IRS) and request all information that it has collected about you. FOIA does not apply to Congress, the federal courts, the executive staff of the White House, state or local governments, and private businesses. Exemptions to FOIA include, but are not limited to, national security, internal agency matters (e.g., personnel issues), criminal investigations, financial institutions, and an individual’s private life. Immediately after taking office, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies, indicating that FOIA should be administered with a clear presumption: In the face of doubt, openness prevails.8 The memorandum directs that information should not be withheld simply because it is legal to do so and that if an agency cannot make full disclosure of information, it should consider making a partial disclosure. Case 4-4 examines the scope of a FOIA request. Government in Sunshine Act The Government in Sunshine Act requires agency business meetings to be open to the public if the agency is headed by a collegiate body. A collegiate body consists of two or more persons, the majority of whom are appointed by the president with the advice and consent of the Senate. This open-meeting requirement applies only when a quorum is present. The law also requires agencies to keep records of closed meetings.

Privacy Act Under the Privacy Act of 1974, a federal agency may not disclose information about an individual to other agencies or organizations without that individual's written consent. This law guarantees three primary rights: The right to see records about oneself, subject to the Privacy Act's exemptions. The right to amend a nonexempt record if it is inaccurate, irrelevant, untimely, or incomplete. The right to sue the government for violations of the statute, such as permitting unauthorized individuals to read your records. CASE 4-4 CHAVERRA V. UNITED STATES IMMIGRATION & CUSTOMS ENFORCEMENT United States District Court for the District of Columbia U.S. Dist. LEXIS 169935 (2018) FACTS: On May 15, 2017, while detained in ICE custody at the Stewart Detention Center in Lumpkin, Georgia, Jimenez died in an apparent suicide. According to the Complaint, Defendant had identified Jimenez as a suicide risk when he first arrived at the facility but nevertheless failed to afford him the necessary mental-health care and intervention. Instead, Plaintiff says, ICE placed Jimenez in solitary confinement. This unfortunate treatment spurred Jimenez's family—led by Chaverra—to seek more information about the circumstances of his death. Chaverra began his quest for information through the FOIA. He filed a request with ICE seeking "all records, including medical, pertaining to" Jimenez. In its final response, ICE withheld all responsive records in full under Exemption 7(A), which protects certain documents compiled for law-enforcement purposes during the pendency of proceedings. In the event Exemption 7(A)'s protection expires—that is, the proceedings conclude—ICE reserved the right to assert additional exemptions. Chaverra's appeal to the agency of this determination proved unsuccessful. Plaintiff next bypassed FOIA's procedures and directly contacted the ICE Health Services Corps at the Stewart Detention Center, from whom he requested the same medical records. This avenue, too, ended in a roadblock: ICE informed Chaverra that it would entertain a request for Jimenez's medical records only via FOIA. So Chaverra reverted once again to that process. He filed a number of additional requests seeking a broad range of documents from a variety of governmental entities. Plaintiff's efforts again bore no fruit, ultimately prompting this suit. Chaverra filed a seven-count Complaint against ICE, two other offices of the Department of Homeland Security, and Dr. Stewart D. Smith, the administrator who oversees the ICE Health Services Corps. FOIA serves as the cause of action for his first five counts. There, Plaintiff challenges the agencies' withholding of various documents, including Jimenez's medical records from his time in ICE detention, and alleges that Defendants did not adequately respond to Plaintiff's subsequent FOIA requests. In Count VI, Chaverra seeks similar relief through a Petition for Writ

of Mandamus. He alleges that the Privacy Rule—a regulation promulgated pursuant to the Health Insurance Portability and Accountability Act (HIPAA)—bestows upon him a clear legal right to Jimenez's medical records. Chaverra thus asks the Court to compel Defendants to turn over these records. Plaintiff seeks the same relief in Count VII, but this time under § 706(1) of the APA. Like his mandamus count, Chaverra contends here that ICE has a legal obligation under the Privacy Rule to turn over Jimenez's medical records and explains that Defendant's refusal to do so constitutes agency action contrary to law. Defendants moved to dismiss Counts VI (mandamus) and VII (APA) but did not challenge the FOIA claims this time around. ISSUE: Whether the FOIA provides an "adequate remedy" for discovery of medical records, thereby foreclosing discovery requests pursuant to HIPPA's Privacy Rule as well as the APA? REASONING: ICE presents a host of arguments as to why Chaverra cannot proceed with his final two counts. The Court need not weigh in on all these disputes, however, because both Plaintiff's APA and mandamus claims stumble on the same obstacle: FOIA provides an adequate remedy for Chaverra's grievance. Although the APA was enacted to provide a broad spectrum of judicial review of agency action, such review is only permissible if there is no other adequate remedy at law. An adequate remedy does not mean identical relief, but only relief of the same genre. There is little doubt that FOIA offers an adequate remedy when litigants seek to gain access to records. Chaverra's APA cause of action complains that ICE unlawfully withheld and unreasonably delayed the legally mandated release of Mr. Jimenez's medical records. As redress, he seeks access to these records. FOIA expressly provides that remedy. In an attempt to clear it and proceed with his cause of action, Plaintiff lodges two objections. First, he contends that FOIA's promised relief is not adequate because some of the statute's exemptions might apply. This argument faces an uphill battle from the start. It is well settled that the alternate remedy must be only of the "same genre"; it need not be identical. The relevant "genre" here is easy to identify: the disclosure of documents withheld by governmental organizations. This is what Plaintiff seeks, and this is what FOIA provides. Second, Chaverra points the Court toward the agency's own action. He notes that ICE created an online portal permitting individuals discharged from its detention centers to access their medical records. From this fact, he concludes that ICE does not mandate that FOIA is the exclusive remedy for obtaining these medical records. This argument falls wide of the mark. The question under § 704 is not whether the agency intends FOIA to be the exclusive remedy, but whether FOIA itself provides an "adequate remedy" for the plaintiff's complaint. The fact that ICE may, in some other

circumstances, permit the disclosure of medical records through other means has no bearing on this legal question. This objection, too, does not save Chaverra's APA claim. For much the same reason, Chaverra's mandamus count yields the same result. A writ of mandamus compels an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. "Mandamus is drastic; it is available only in extraordinary situations. Relief is available only if a plaintiff demonstrates (1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists." Chaverra asserts that HIPAA's Privacy Rule serves as the basis for his legal entitlement to mandamus relief. Although the Government is now adamant that the Privacy Rule does not cover ICE's retention of medical records, the Court need not reach this issue, for Chaverra's claim falters on the third requirement necessary to invoke mandamus jurisdiction: that no alternative adequate remedy exists. In a near unanimous chorus, courts in this circuit have rejected plaintiffs' attempts to use a writ of mandamus to compel agencies to turn over government records because FOIA gives them an adequate remedy. DECISION AND REMEDY: For these reasons, the Court will grant Defendants' Partial Motion to Dismiss. Count VI of Chaverra's Complaint will be dismissed under Rule 12(b)(1) and Count VII will be dismissed under Rule 12(b)(6). A separate Order so stating will issue this day. SIGNIFICANCE OF CASE: A request for records under the FOIA forecloses other avenues of discovery if the FOIA provides an adequate remedy to litigants. "Adequate" means relief of the same genre, but not necessarily identical. CRITICAL THINKING If ICE again denies the plaintiff's FOIA request, what other options does plaintiff have? Do you agree that plaintiff's other avenues to obtain the information were properly denied? ETHICAL DECISION MAKING What values are in tension with the transparency objective of FOIA requests? Page 80 E-Commerce and the Law E-Government: Changing the Relationship between the Government and Citizens According to the United Nations, e-government, which is defined as the delivery of government services through digital information technologies, including the Internet, is important because it reduces the cost of government while significantly improving the quality of services and citizen access. According to the latest UN report about this topic, e-government makes public administration more proactive, efficient, transparent, and service-oriented. Annual surveys by the UN indicate that nations throughout the world have made significant progress in e-government development, with the United States and Europe being among the leaders in this development. The UN has characterized the development of e-government into the following stages: Stage I—Emerging:

A government’s online presence mainly consists of a web page and/or an official website; links to ministries or departments of education, health, social welfare, labor, and finance may or may not exist. Much of the information is static, and there is little interaction with citizens. Stage II—Enhanced: Governments provide more information on public policy and governance. They have created links that enable citizens to access archived information such as documents, forms, reports, laws and regulations, and newsletters easily. Stage III—Interactive: Governments deliver online services such as downloadable forms for tax payments and applications for license renewals. In addition, the beginnings of an interactive portal or website with services to enhance the convenience of citizens are evident. Stage IV—Transactional: Governments begin to transform themselves by introducing two-way interactions between citizen and government (C to G). This includes options for paying taxes and applying for ID cards, birth certificates, passports, and license renewals as well as similar C-to-G interactions, and it allows the citizen to access these services online 24/7. Stage V—Connected: Governments transform themselves into a connected entity that responds to the needs of its citizens by developing an integrated back office infrastructure. This is the most sophisticated level of online e-government initiatives, and it is characterized by Horizontal connections (among government agencies). Vertical connections (central and local government agencies). Infrastructure connections (interoperability issues). Connections between governments and citizens. Connections among stakeholders (government, private sector, academic institutions, NGOs, and civil society). In addition, governments support and encourage e-participation and citizen engagement in the decision-making process.9 The most recent ranking of nations in terms of their progress toward development of effective e-government was as follows: (1) Sweden, (2) Denmark, (3) Norway, (4) United States, (5) Netherlands, (6) Republic of Korea, (7) Canada, (8) Australia, (9) France, and (10) United Kingdom.10 Sadly, the United States was at the top of the list in 2001, but because the Bush administration failed to make a serious commitment to transforming the federal government through information technology and failed to develop an overall e-government plan detailing where the government wants to go and how it wants to get there, other nations have made much more rapid progress in this area than has the United States.11 Page 81The Privacy Act applies only to records about individuals maintained by agencies in the executive branch of the federal government. There are 10 exemptions to the Privacy Act under which an agency can withhold certain kinds of information from you. Examples of exempt records are those containing classified information on national

security and those concerning criminal investigations.12 Page 82 CASE OPENER WRAP-UP Does the EPA Have an Obligation to Regulate Automobile Emissions? Nineteen private organizations had petitioned the EPA to require that it regulate carbon dioxide from automobile emissions. After holding hearings and requesting comments from the public, the EPA declined the request to regulate, arguing that they did not have statutory authority to do so and that executive policy addressing global warming warranted their refusal to do so. The matter was appealed and eventually worked its way to the U.S. Supreme Court. The Bush White House filed an amicus curie ("friend of the court") brief arguing that the EPA was attempting to get the automobile industry to voluntarily reduce emissions. The Alliance of Automobile Manufacturers also came to the EPA's defense, arguing that the agency, as well as the states, had no authority to regulate automobile emissions. In a 5–4 decision, the U.S. Supreme Court disagreed, holding that the Clean Air Act authorizes the EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a "judgment" that such emissions contribute to climate change. Moreover, the Court held that the Clean Air Act's definition of air pollutant includes carbon dioxide. In June 2009, the EPA granted a Clean Air Act waiver of preemption to California, allowing California to implement its own, more stringent greenhouse gas emission standards for motor vehicles beginning with model-year 2009. By mid-2010, with the agreement of the auto industry, the California standard became the federal standard.

SUMMARY Introduction to Administrative Law Administrative law consists of the substantive and procedural rules created by administrative agencies (government bodies of the city, county, state, or federal government) involving applications, licenses, permits, available information, hearings, appeals, and decision making. An administrative agency is generally defined as any body created by the legislative branch (e.g., Congress, a state legislature, or a city council) to carry out specific duties. Administrative agencies are created by Congress through passage of enabling legislation, which is a statute that specifies the name, functions, and specific powers of the administrative agency. Enabling statutes grant agencies broad powers for the purpose of serving the "public interest, convenience, and necessity." An agency holds an administrative hearing before an administrative law judge (ALJ). The ALJ may attempt to get the parties to settle but has the power to

issue a binding decision. Types of Administrative Agencies Executive agency: The administrative head of an executive agency is appointed by the president with the advice and consent of the U.S. Senate. Executive-agency heads may be discharged by the president at any time, for any reason. Executive agencies are generally located within the executive branch, under one of the cabinet-level departments (and thus are referred to as cabinet-level agencies). Examples are the Federal Aviation Agency (FAA) and the Food and Drug Administration (FDA). Independent agency: Independent agencies are governed by a board of commissioners. The president appoints the commissioners with the advice and consent of the Senate. Commissioners serve fixed terms and cannot be removed except for cause. No more than a simple majority of an independent agency can be members of any single political party. Hybrid agency: Hybrid agencies do not fall clearly into classification as an independent or an executive agency. Created as one type of agency, the body may share characteristics of the other type. The EPA, for example, was created as an independent agency, not located within any department of the executive branch, yet the head of the EPA serves at the whim of the president. How Do Agencies Operate? In 1946, Congress passed the Administrative Procedures Act (APA) as a major limitation on how agencies are run. The APA provides very specific guidelines on rule making by agencies. Informal rule making: Under the APA, the proposed rule is published in the Federal Register, and there is opportunity for public comment. Formal rule making: All rules must be enacted by an agency as part of a formal hearing process that includes a complete transcript. The process begins with publication in the Federal Register of a notice of proposed rule making by the agency. Next, there is a public hearing at which witnesses give testimony on the pros and cons of the proposed rule and are subject to cross-examination. The agency makes and publishes formal findings. If a regulation is adopted, the final rule is published in the Federal Register. Hybrid rule making: Hybrid rule making is an attempt to combine the best features of formal and informal rule making. The starting point is publication in the Federal Register, followed by the opportunity for submission of written comments and then an informal public hearing with a more restricted opportunity for cross-examination than that in formal rule making. Exempted rule making: The APA contains an exemption from rule making that allows an agency to decide whether public participation will be allowed. Exemptions include rule-making proceedings with regard to military or foreign affairs, agency management or personnel, and public property, loans, grants, benefits, or contracts of an agency. Interpretive rules are rules that do not create any new rights or duties but merely state the agency’s

interpretation of an existing law. They are generally very detailed, step-by-step statements of what actions a party is to take to be considered in compliance with an existing law. In reg-neg, each concerned interest group and the agency itself sends a representative to bargaining sessions led by a mediator. If the parties achieve a consensus, that agreement is forwarded to the agency. The agency is then expected to publish the compromise as a proposed rule in the Federal Register and follow through with the appropriate rule-making procedures. If the agency does not agree with the proposal the group negotiated, the agency is free to try to modify or replace it. Limitations on Agency Powers There are four basic limits on agency power: political, statutory, judicial, and informational. Freedom of Information Act: Passed in 1966, FOIA requires federal agencies to publish in the Federal Register places where the public can get information from the agencies. Any individual or business may make a FOIA request to a federal agency for information on how the agency gets and spends its money, statistics and/or information collected by the agency on a given topic, and any records the government has about the individual seeking the information. Exemptions to FOIA include, but are not limited to, national security, internal agency matters (e.g., personnel issues), criminal investigations, financial institutions, and an individual's private life. Government in Sunshine Act: This act requires agency business meetings to be open to the public if the agency is headed by a collegiate body (i.e., two or more persons, the majority of whom are appointed by the president with the advice and consent of the Senate). The law also requires agencies to keep records of closed meetings. Privacy Act: Under the Privacy Act, a federal agency may not disclose information about an individual to other agencies or organizations without that individual's written consent. Federal and State Administrative Agencies Administrative agencies exist at the federal and state levels.

Point/Counterpoint Do Agencies Have Too Much Power? YES NO Agencies often overstep their bounds, attempting to regulate in areas not intended. Regulatory decisions are firmly in the hands of nonelected officials, meaning there is little accountability. Legislative power belongs to Congress and should not be doled out to agencies. Agencies are particularly susceptible to being taken over by special interests. Agencies need to have enough power to accomplish their goals. Without agencies to take the lead in highly specialized areas, the courts would be overwhelmed. The Congressional Review Act (CRA) acts as a check on agency power. The courts have the

power to strike down agency rules as arbitrary or capricious, or as exceeding a valid grant of statutory authority.

Questions & Problems Page 85 What is enabling legislation? What are the limits on agency power? What are the three main powers given to agencies? List the three categories of agencies. Describe the various types of rule making. In 1999 and 2001, the Department of Labor's (DOL) Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the administrative exemption to overtime pay requirements under the Fair Labor Standards Act (FLSA). In 2004, the DOL issued new regulations regarding the exemption. Mortgage Bankers Association (MBA) requested a new interpretation of the revised regulations as they applied to mortgage-loan officers. In 2006, an opinion letter found that mortgage-loan officers fell within the administrative exemption. In 2010, the DOL again altered its interpretation of the administrative exemption. Without notice or an opportunity for comment, the DOL withdrew the 2006 opinion letter and issued an Administrator's Interpretation concluding that mortgage-loan officers do not qualify for the administrative exemption. MBA filed a lawsuit contending that the Administrator's Interpretation was procedurally invalid based on case law which holds that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. Is a repeal of a rule subject to the notice-and-comment requirements of the APA? Source: Perez v. Mortgage Bankers Association, 135 S. Ct. 1199 (2015). A trade association asked the Federal Communications Commission (FCC) to clarify language in 47 U.S.C.S. § 332(c)(7)(B)(ii) which required state and local governments to act on any request to place, construct, or modify personal wireless service facilities "within a reasonable period of time." The FCC issued a ruling that a "reasonable period of time" under the statute was presumptively (but rebuttably) 90 days to process a collocation application and 150 days to process all other applications. Several cities challenged the FCC's ruling. The Fifth Circuit found that the FCC possessed statutory authority to adopt the 90- and 150-day time frames and that the FCC's ruling was not arbitrary and capricious. The Supreme Court granted certiorari to review the issue. Is an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference? Why or why not? Source: City of

Arlington v. FCC, 569 U.S. 290 (2013). Morales, a native and citizen of Mexico, was arrested in 1994 for entering the United States without inspection. He was released and served with a mail-out order to show cause why he should not be sent back to Mexico. Eventually, a removal hearing was scheduled, and Morales was notified by certified mail of the time and place of the hearing. When Morales failed to attend the hearing, he was ordered removed in absentia. The Immigration and Naturalization Service (INS) apprehended and removed Morales from the United States in 1998. He attempted to reenter illegally in January 2001—this time using a false border-crossing card. He was apprehended at the port of entry and was expeditiously removed. Undaunted, Morales reentered the United States undetected the following day. Sometime between his 1998 and 2001 removals, Morales married a U.S. citizen. In March 2001, Morales's wife filed an I-130 alien relative petition based on his marriage to a U.S. citizen. When Morales and his wife met with the INS in January 2003, an immigration officer served them with a denial of the I-130 petition and a notice of intent to reinstate Morales's removal order. The case came before a three-judge panel, which held that the regulation authorizing immigration officers to issue reinstatement orders is invalid, and Morales's removal order could be reinstated only by an immigration judge. Until 1997, removal orders could be reinstated only by immigration judges (i.e., not immigration officers). In 1997, the attorney general changed the applicable regulation to delegate this authority, in most cases, to immigration officers. Does the attorney general have the authority to change an INS regulation? Why or why not? Source: Raul Morales-Izuierdo v. Alberto R. Gonzales, Attorney General, 2007 U.S. App. LEXIS 10865 (9th Cir. 2007). Six conservation organizations filed a petition in Thurston County Superior Court, asking that court to hold, pursuant to a provision in the Administrative Procedures Act (APA), that the Washington Forest Practices Board, the Washington Department of Ecology, and the Washington Department of Natural Resources (agencies) "failed to promulgate forest practice rules that advanced the environmental protection purposes and policies of the Forest Practices Act of 1974." The agencies countered by arguing that a formal petition for rule making must precede any petition for judicial review. Must an interest group exhaust administrative remedies before suing in a state or federal court? Why or why not? Source: Northwest Ecosystem Alliance v. Washington Forest Practices Board, 66 P.3d 614 (2003). Congress established an independent agency, the Consumer Financial Protection Bureau (CFPB), to curb fraud and promote transparency in consumer loans, home mortgages, personal credit cards, and retail banking. Under the Dodd-Frank Wall Street Reform and Consumer Protection

Act, Congress gave the CFPB a single Director protected against removal by the President without cause. The Director of this independent agency may only be fired only for “inefficiency, neglect of duty, or malfeasance in office.” That design choice is challenged here as an unconstitutional impediment to the President’s power. Does removal of an independent agency’s director (i.e., the Director of the CFPB) only for cause violate the President’s powers under Article II? Source: PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (2018). Thormac, LLC, d/b/a McCormack’s Whisky Grill and Smokehouse, had its alcoholic beverage license suspended for seven days, plus a $500 fine, for failure to comply with the statute that requires food sales be at least 45 percent of the combined gross receipts from the sale of mixed beverages and food. McCormack’s appealed the decision. The charge against the restaurant stated that during the preceding license year, the gross receipts from sale of food was $159,651 and its total sales for mixed beverages was $245,306 (39.2 percent from food and 60.58 percent from mixed beverages). At the hearing, an ABC Special Agent testified that the restaurant sells more food than liquor, but the restaurant offers expensive, premium liquors, and the ratio is based on sales, not volume. McCormack’s testified that it could not increase the price of food because it would exceed market price and result in customers going elsewhere. On appeal of the ABC decision, the court affirmed and ordered a 30-day suspension of the alcohol license, reduced to 15 days if they agreed to pay $1,000 up front. McCormack argued that the court merely “rubber-stamped” the ABC Board’s Final Decision and failed to perform the necessary legal analysis. How should the appellate court rule? Was the decision to uphold the appeal arbitrary or capricious? Source: [Thormac, LLC v. Dep’t of Alcoholic Beverages, 68 Va. App. 216 (2017).] The respondent, the Public Company Accounting Oversight Board, was created as part of a series of accounting reforms in the Sarbanes-Oxley Act of 2002. The board is composed of five members appointed by the Securities and Exchange Commission (SEC). It was modeled on private, self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to SEC oversight. Unlike these organizations, however, the board is a government-created entity with expansive powers to govern an entire industry. Every accounting firm that audits public companies under the securities laws must register with the board, pay it an annual fee, and comply with its rules and oversight. The board may inspect registered firms, initiate formal investigations, and issue severe sanctions in its disciplinary proceedings. The parties agree that the board is “part of the Government” for constitutional purposes. Although the SEC has oversight of the board, it

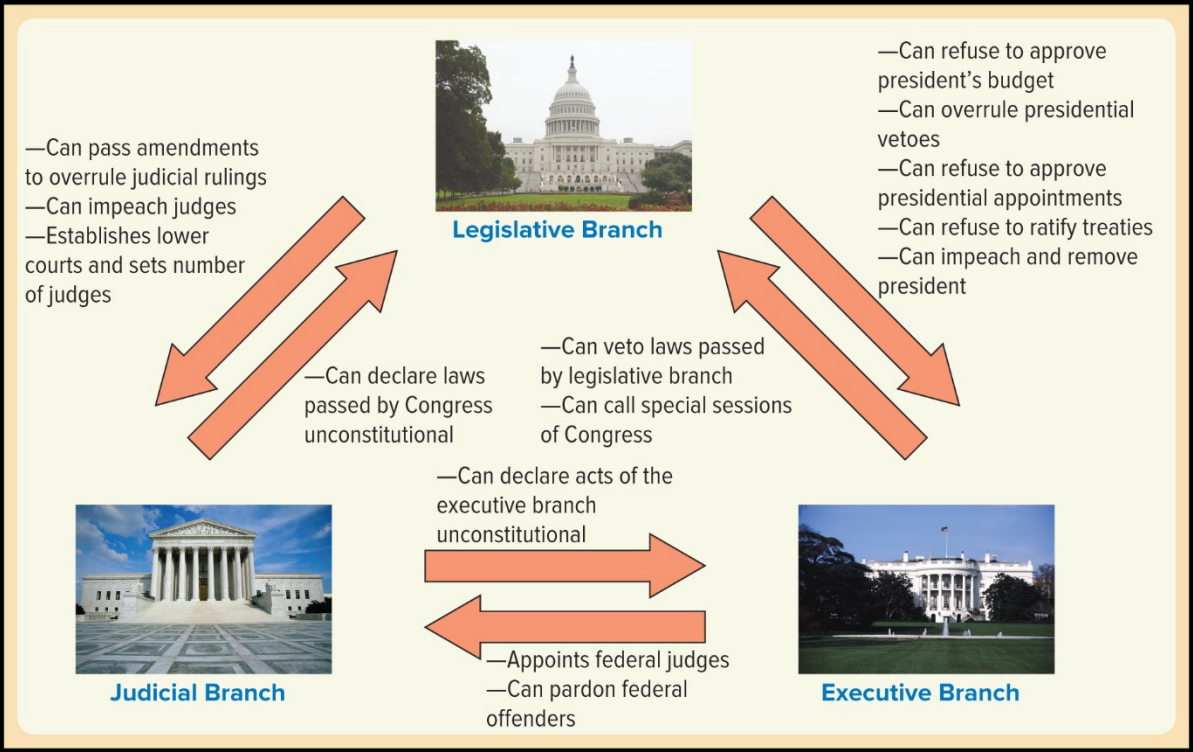
cannot remove board members at will but can do so only “for good cause shown,” “in accordance with” specified procedures. The parties also agree that the commissioners, in turn, cannot themselves be removed by the president except for “inefficiency, neglect of duty, or malfeasance in office.” The board inspected the petitioner accounting firm, released a report critical of its auditing procedures, and began a formal investigation. The firm and the petitioner, Free Enterprise Fund, a nonprofit organization of which the firm is a member, sued the board and its members, seeking, inter alia, a declaratory judgment that the board is unconstitutional and an injunction preventing the board from exercising its powers. The petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring executive power on board members without subjecting them to presidential control. Is the Public Company Accounting Oversight Board constitutional? Why or why not? Source: Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

Part 1 The Legal Environment of Business CHAPTER 5 Constitutional Law Page 86 CASE OPENER The Constitutionality of the Affordable Care Act In 2010, in an attempt to increase the number of Americans covered by health insurance and reduce the cost of health care, Congress passed the Patient Protection and Affordable Care Act. A key provision of the act was the “individual mandate,” a provision requiring most Americans to obtain “minimum essential” health insurance. By 2014, those not exempt or covered by insurance provided by their employer or a government program would have to buy insurance from a private insurer, or they would be assessed a shared responsibility payment by the Internal Revenue Service. This penalty would be assessed and collected in the same manner as any other tax penalty. Twenty-six states, several individuals, and the National Federation of Independent Business brought an action challenging the constitutionality of the individual mandate, among other provisions of the act. The 11th Circuit Court of Appeals upheld the other challenged provisions of the act but found that Congress lacked the authority to pass the individual mandate. The appellate court went on to hold that the individual mandate was severable from the rest of the act, despite the argument that the framework of the act depended on the individual mandate, and so upheld the rest of the act. Did Congress have the authority to pass the act under the commerce clause? Did Congress have the authority to pass the act under its

power to lay and collect taxes? LEARNING OBJECTIVES LO 5-1 Define federalism. LO 5-2 Explain the function of each branch of government and how each branch serves to check the others. LO 5-3 Describe the relationship between the supremacy clause and preemption. LO 5-4 Describe how the commerce clause affects the power of both the state and federal governments to regulate. LO 5-5 Differentiate between commercial and political speech. LO 5-6 Recognize how the rights guaranteed by the Bill of Rights affect business managers. Page 87 The U.S. Constitution sets forth the framework of our nation's government; it establishes a system of government that divides power between the federal government and the states. This system of government provides the focus for this chapter. In this chapter, we examine the constitutional provisions that affect business. Then we turn our focus to the primary source of the federal government's authority to regulate business: the commerce clause. We next examine the federal government's authority to tax and spend. Finally, in the last part of the chapter, we focus on how several amendments to the Constitution affect business.

The U.S. Constitution The United States Constitution is the foundation of our government. It establishes our system of government and guarantees certain fundamental rights for its citizens, as will be described in detail in this chapter. Federalism LO 5-1 Define federalism. The U.S. Constitution establishes a system of government based on the principle of federalism, according to which the authority to govern is divided between federal and state governments. Many people believe that a system of federalism makes a lot of sense for a country that is as large as ours with SD many diverse groups of people living in different regions with different needs, yet sharing some common needs. Federalism gives us a large government entity (the federal government) to be responsible for common needs such as a national defense, a financial system, and foreign policy to deal with other nations, while establishing another level of government (state governments) that can be more responsive to the local needs that would vary by discrete geographic regions. According to the Tenth Amendment to the Constitution, all powers that the Constitution neither gives exclusively to the federal government nor takes from the states are reserved for the states. Because the federal government has only those powers granted to it by the Constitution, federal legislation that affects business must be based on an expressed constitutional grant of authority. The Branches of the Federal Government LO 5-2 Explain the function of each branch of government and

how each branch serves to check the others. In addition to allocating authority between state and federal governments, the Constitution allocates the power of the federal government among the three branches of government. The first three articles of the Constitution establish three independent branches of the federal government: the legislative, executive, and judicial branches. The Constitution ensures that each branch maintains a separate sphere of power to prevent any one branch from obtaining undue power and monopolizing control of government. The Constitution also establishes a system of checks and balances. Each branch's powers keep the other branches from dominating the government. For example, Congress, the legislative or lawmaking branch, has the power to enact legislation, but the president can veto a law that Congress passes. The legislature, however, can overturn a presidential veto with a two-thirds vote of the members of Congress. And if Congress passes a bill and the president signs it, the judiciary can strike it down as unconstitutional. Exhibit 5-1 illustrates the system of checks and balances in more detail. Exhibit 5-1The System of Checks and Balances (top) Image Source; (bottom right) Jill Braaten/McGraw Hill; (bottom left) Hisham F. Ibrahim/Getty Images. Judicial Review Although the Constitution does not explicitly allow courts to review legislative and executive actions to determine whether they are constitutional, early common law established this process, known as judicial review. In the landmark 1803 U.S. Supreme Court case Marbury v. Madison, Chief Justice John Marshall wrote for the majority: Page 88 [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case [conforms] to the law, disregarding the constitution; or [conforms] to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. Judicial review also allows courts to review the constitutionality of lower courts' decisions.


—Can pass amendments to overrule judicial rulings
—Can impeach judges
—Establishes lower courts and sets number of judges
Legislative Branch
—Can refuse to approve president's budget
—Can overrule presidential vetoes
—Can refuse to approve presidential appointments
—Can refuse to ratify treaties
—Can impeach and remove president
—Can declare laws passed by Congress unconstitutional
—Can veto laws passed by legislative branch
—Can call special sessions of Congress
—Can declare acts of the executive branch unconstitutional
Judicial Branch
—Appoints federal judges
—Can pardon federal offenders
Executive Branch

The Supremacy Clause and Federal Preemption LO 5-3 Describe the relationship between the supremacy clause and preemption. The supremacy clause, located in Article VI of the Constitution, provides that the Constitution, laws, and treaties of the United States constitute the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Any state or local law that directly conflicts with the Constitution, federal laws, or treaties is void. Federal laws include rules passed by federal administrative agencies. For example, the Federal Aviation Administration has banned the use of cell phones on airplanes. If a Missouri law permitted cell phone usage on airplanes, it would be unconstitutional according to the supremacy clause. In some areas, the state and federal governments have concurrent authority; that is, both governments have the power to regulate the same subject matter. In such cases, the states may regulate in the area as long as a person's compliance with the state regulation would not cause a violation of a federal regulation. For example, Congress has established a number of environmental standards, but some states have passed even more protective standards. Sometimes, however, when the state and federal governments have concurrent authority, the federal government can decide to regulate that area exclusively. In such a

situation, according to the doctrine of federal preemption, the state law is unconstitutional. To determine whether Congress intended to provide exclusive regulation, courts look to the language of the statute and transcripts of congressional hearings.

CASE Nugget Can States Require On-line Sellers Without a Physical Presence in a State to Collect State Sales Tax? South Dakota v. Wayfair United States Supreme Court 138 S. Ct. 2080 (2018) Ever since the 1992 decision in the case of Quill Corporation v. North Dakota, online retailers could be required to collect state and local sales taxes only in jurisdictions where they operated a warehouse or office or had some other physical presence. Small on-line retailers obviously appreciated this rule, but many states felt they were losing out on significant revenue, and stores with physical locations in many states felt the on-line retailers received an unfair competitive advantage due to this rule. In 2018, in a case that the Government Accounting Office estimates could generate $13 billion in state and local tax revenue, the United State Supreme Court struck down this physical presence rule. The case, South Dakota v. Wayfair, arose after the state passed a law that required out-of-state sellers that deliver goods or services into South Dakota to collect state sales tax on those transactions. Sellers who sold less than $100,000 worth of goods in the state or engaged in 200 or fewer separate transactions for the delivery of goods or services into the state were exempt from the law. The majority felt that the emergence of the internet as a mainstream medium for interstate commerce caused the physical presence rule to become further removed from economic reality and resulted in significant revenue losses to the States. While this ruling only directly affects those doing business in South Dakota, most commentators predict that other states will now follow suit and require on-line retailers without a physical presence in their states to now collect sales tax.

Taxing and Spending Powers of the Federal Government No government can function without a source of revenue. Article I, Section 8, of the Constitution gives the federal government the “Power to lay and collect Taxes, Duties, Imports, and Excises.” The taxes laid by Congress, however, must be uniform across the states. In other words, the government cannot impose higher taxes on residents of one state than it imposes on those of another.

Although tax collection allows the government to provide essential services, the government can also use taxes for other purposes. For example, to encourage the development of certain industries and discourage the development of others, the government can provide tax credits for firms entering favored industries. As long as the “motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government,” the credit is constitutional. The fact that it also has a regulatory impact does not affect the constitutionality of the credit. Although we may all think we know what a tax is, we may be surprised by what the courts call a tax. For example, many were surprised by the Supreme Court’s determination that the penalty imposed under the Affordable Care Act on those who do not obtain health care insurance is a tax. In explaining that finding, Chief Justice Roberts explained that although the payment was intended to encourage the purchase of insurance, nothing in the mandate made the failure to purchase the insurance unlawful; the law could be read as simply imposing a tax, collected by the IRS like other taxes, on those choosing not to purchase health insurance. The chief justice found no problem with the fact that the statute referred to the payment as a penalty and not as a tax. BUT WHAT IF? . . . What if the facts had been different and the language of the ACA had clearly stated that although the payment was to be made through the IRS, the payment for failure to purchase health care insurance was a penalty and not a tax? Would that language have necessarily affected the Supreme Court’s interpretation of the constitutionality of the statute? Article I, Section 8, also grants Congress spending power by authorizing it to “pay the Debts and provide for the common Defense and general Welfare of the United States.” As with its power to tax, Congress can use its spending power to achieve social welfare objectives. For example, in South Dakota v. Dole, the Supreme Court upheld a federal statute that grants federal funds for state highways to only those states in which 21 is the legal drinking age.

Other Constitutional Restrictions on Government The Privileges and Immunities Clause Article IV, Section 2, of the Constitution states that “Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” This provision, called the privileges and immunities clause, prohibits states from discriminating against citizens of other states when those nonresidents engage in ordinary and essential activities. These activities include buying and selling property, seeking employment, and using the court system. States may treat residents and

nonresidents differently only when they have substantial reason for doing so. For example, according to the privileges and immunities clause, a state cannot prohibit nonresidents from opening restaurants in the state. States can, however, allow state universities to charge higher tuition to out-of-state students because residents pay taxes that fund state universities, whereas out-of-state students do not. The Full Faith and Credit Clause Article IV, Section 1, of the Constitution contains the full faith and credit clause. This clause states, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” This provision requires courts in all states to uphold contracts and public acts established in other states. For example, this clause protects wills, marriage and divorce decrees, and judgments in civil courts. Courts have held, however, that states do not have to give full faith and credit to laws that violate their public policy. Thus, for example, although Massachusetts permits same-sex marriage, the full faith and credit clause does not require other states to recognize such marriages. Page 95 The Contract Clause Article I, Section 10, contains the contract clause, which states that government may not pass any “Law impairing the Obligation of Contracts.” In application, courts interpret this clause to mean that no law can be passed that will unreasonably interfere with existing contracts. For example, in the 1934 U.S. Supreme Court case Home Building & Loan Association v. Blaisdell, the Home Building & Loan Association challenged Minnesota’s Mortgage Moratorium Act as a violation of the contract clause. The act, implemented temporarily during the Great Depression, authorized courts to extend the redemption periods of mortgages to delay foreclosures of mortgages on real estate. The Court ruled that the act’s provisions were within the state’s police power to protect its citizens and did not violate the contract clause. Although the act impaired contractual obligations between lenders and borrowers, the Court held that courts must balance even substantial contractual impairments against states’ interest in protecting the welfare of their citizens.

The Amendments to the Constitution The first 10 amendments to the U.S. Constitution, known as the Bill of Rights, substantially affect government regulation of business. These amendments prohibit the federal government from infringing on individual freedoms. Moreover, the Fourteenth Amendment extends most of the provisions in the Bill of Rights to the states, prohibiting state interference in citizens’ exercise of their rights. Thus, the

federal and state governments cannot deprive individuals of the freedoms protected by the Bill of Rights. Remember, however, that the amendments are a limit only on actions of the government—they do not limit the behavior of private employers. This distinction is commonly misunderstood by many citizens. Many other countries do not have constitutional provisions to protect citizens from the government. The Australian constitution, for example, only creates the framework for government in Australia. In many of the countries that do have individual protections in their constitutions, these protections have emerged recently. Some other countries' constitutions provide rights that American citizens do not have, as the Global Context box on Belarus's constitution illustrates. Courts apply many amendments to corporations because corporations are treated, in most cases, as artificial persons. The remainder of this chapter describes the amendments that most significantly affect the regulatory environment of business. Exhibit 5-2 summarizes the first 10 amendments. Exhibit 5-2Summary of the Bill of Rights AMENDMENT PROVISIONS First Protects freedom of religion, press, speech, and peaceable assembly. Ensures that citizens have the right to ask the government to redress grievances. Second Finds that a well-regulated militia is necessary for security. States that government cannot infringe on citizens' right to bear arms. Third States that government cannot house soldiers in private residences during peacetime or during war except for provisions in the law. Fourth Protects citizens from unreasonable search and seizure. Ensures that government issues warrants only with probable cause. Fifth Ensures that government does not put citizens on trial except by the indictment of a grand jury. Gives citizens the right not to testify against themselves. Prevents government from trying citizens twice for the same crime. Creates due process rights. States that government cannot take private property for public use without just compensation. Sixth Provides the right to a speedy public trial with an impartial jury, the right to know what criminal accusations a citizen faces, the right to have witnesses both against and for the accused, and the right to have an attorney. Seventh States that in common lawsuits in which the monetary value exceeds $20, citizens have the right to a trial by jury. Eighth States that government will not set bail at excessive levels. Prohibits government imposition of excessive fines. Prohibits cruel and unusual punishment. Ninth States that although the Bill of Rights names certain rights, this does not remove other rights retained by citizens. Tenth States that powers that the Constitution does not give to the federal government are reserved for the states. The First Amendment Freedom of Speech and AssemblyThe First Amendment guarantees freedom of speech, including gestures and other forms of expression, and of the

press. It prohibits abridgment of the right to assemble peacefully and to petition the government for redress of grievances. Finally, it prohibits the government from aiding the establishment of religion and from interfering with the free exercise of religion. Like other rights, First Amendment rights are not absolute. For example, a person does not have the right to yell “Fire!” in a crowded theater. Nor does the First Amendment protect false statements about another that are injurious to that person’s reputation. Due to the difficulty of determining the boundaries of individual rights, courts hear a large number of First Amendment cases. GLOBAL Context Tara McDermott/McGraw Hill Constitution of Belarus We think of the Constitution as establishing our system of government and guaranteeing certain rights to us, but some nations’ constitutions actually impose duties on their citizens. For example, the constitution of Belarus requires everyone to protect the environment, preserve the nation’s historical and cultural heritage and other cultural treasures, and respect the dignity, rights, liberties, and legitimate interests of others. In addition, although the U.S. Constitution’s Bill of Rights primarily restricts the government from interfering with our freedoms, some constitutions go much further in terms of giving people rights. For example, under the Belarus constitution, everyone has the right to an education, housing, and health care. Working people are entitled to work no more than 40 hours per week. LO 5-5 Differentiate between commercial and political speech. Political Speech. The First Amendment protections also apply to corporations. Courts do not, however, treat all corporate speech the same. Sometimes corporations engage in political speech; that is, they support political candidates or referenda. At one time, states restricted firms’ political advertising because they feared that corporations, with their large assets, would drown out other voices. In the 1978 case First National Bank of Boston v. Bellotti, however, the U.S. Supreme Court considered the constitutionality of a Massachusetts law that prohibited certain corporations from spending money to influence voters on issues that did not materially affect the corporation. The Court held that the law was unconstitutional, stating, “The concept that the government may restrict speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” The Court ruled that the First Amendment protects corporate political speech to the same extent as ordinary citizens’s political speech. Page 96Page 97 LO 5-6 Recognize how the rights guaranteed by the Bill of Rights affect business managers. Commercial Speech. Not all corporate speech is political speech. Commercial speech is speech that conveys information related to the sale of goods and services. Courts analyze government restrictions on commercial speech according to a four-

part test established in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York. The Central Hudson test is illustrated in Exhibit 5-3. Exhibit 5-3The Central Hudson Test for Commercial Speech Commercial speech is broader than just advertisements. For example, in the case of Bad Frog Brewery v. New York Liquor Authority, the speech at issue was a label prominently featuring a drawing of a frog holding up its middle “finger” and a slogan such as “The beer so good. . . it’s bad.” When the New York State Liquor Authority rejected the Brewery’s application for brand label approval and registration on grounds that the label encourages combative behavior, fosters a defiance to the health warning on the label, entices underage drinkers, and invites the public not to heed conventional wisdom and to disobey standards of decorum, the company sued to enjoin the state from prohibiting Bad Frog from selling its beer under the controversial label. Page 98 The court of Appeals applied the Central Hudson test to uphold the right of Bad Frog to use its label. In terms of meeting the first standard, that the speech be lawful and not deceptive, the courts said that the consumption of beer is legal in New York, and the labels cannot be said to be deceptive, even if they are offensive. The court found the state’s two stated interests in banning the labels, (i) “protecting children from vulgar and profane advertising,” and (ii) “acting consistently to promote temperance, i.e., the moderate and responsible use of alcohol among those above the legal drinking age and abstention among those below the legal drinking age,” to be “substantial” interests. However, the court found that the state failed to meet the third criterion of advancing its interests to a material degree. Merely prohibiting a single vulgar label on a product children could not even purchase could not be said to be part of any comprehensive program to protect children from vulgarity, and without any empirical evidence that the label could encourage underage drinking and disregard of the health warnings against alcohol use, the state did not demonstrate that their interest in promoting temperance could be materially advanced. Since the third prong of the test was not met, the court did not need to address the final question of whether the restriction was narrowly tailored, although the Brewery had advanced several less restrictive alternatives. Unprotected Speech. The First Amendment right to free speech is not absolute. In the 1942 case Chaplinsky v. New Hampshire, the U.S. Supreme Court held There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Thus, for example, the First Amendment does not protect defamation, or speech that harms the reputation of another. Moreover, as you will learn in Chapter 6, courts may require an individual who uses such speech to compensate the person whose reputation was harmed by the speech. The First Amendment does not protect obscenity, either, although in many cases courts find it difficult to determine whether particular speech constitutes obscenity. In the 1973 case Miller v. California, the U.S. Supreme Court established a three-part standard to determine whether speech is obscene: Would the average person, applying contemporary community standards, find that the speech, taken as a whole, appeals to the prurient (marked by or arousing an immoderate or unwholesome interest or desire) interest? Does the speech depict or describe, in a patently offensive way, sexual conduct specifically defined by law? Does the speech, taken as a whole, lack serious literary, artistic, political, or scientific value? If the answer to all three questions is yes, the First Amendment does not protect the speech in question. Can you identify any significant ambiguities in the Miller standard? Fighting words are a third class of unprotected speech. In Chaplinsky v. New Hampshire, a man protesting the government called the city marshal a “damned racketeer” and a “damned Fascist.” The city arrested him for violating a statute prohibiting the use of offensive, derisive, or annoying words toward another in a public place. The U.S. Supreme Court held: “The English language has a number of words and expressions which by general consent are ‘fighting words’ when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight.” The Court further held that “‘damned racketeer’ and ‘damned Fascist’ are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.” Thus, the Court determined that the First Amendment did not protect the man’s speech. Many universities believe that hate speech, or derogatory speech directed at members of another group, such as another race, satisfies the definition of fighting words. Thus, 60 percent of universities have banned verbal abuse and verbal harassment, and 28 percent have banned advocacy of an offensive viewpoint. State and federal appellate courts have struck down many of these hate-speech codes, but no cases have reached the Supreme Court yet. The international community, however, is less protective of hate speech. For example, a United Nations declaration and a number of foreign laws state that hate speech is not a protected form of expression. Page 99 CASE Nugget Social Media and First Amendment Rights of Students United States Supreme Court Mahanoy Area School District vs. B.L. 141 S. Ct. 2038 (2021) In a 7-1 decision, the U.S. Supreme Court held that a Pennsylvania high school did not have the authority to

discipline a student for making a vulgar, off-campus Snapchat post that did not cause substantial disruption, reinforcing the standard established in Tinker v. Des Moines Independent Community School District and strengthening the first Amendment rights of students. The case began when a student, referred to by the court by her initials, B.I., posted a message on Snapchat stating, “Fuck school, fuck softball, fuck cheer, fuck everything,” after she found out that she had failed to make the varsity cheerleading squad and did not secure her desired place on the softball team. The school punished her by suspending her from the cheerleading squad for one year. With her parents, she sued the school district in a federal district court, arguing that the suspension violated her First Amendment rights and that parents should be the ones responsible for disciplining her, not school authorities. The student won at the trial court level, as well as on appeal to the 3rd Circuit and in the U.S. Supreme Court. The high court noted that schools rarely stand in loco parentis with regard to off-campus speech, and that schools have an interest in protecting unpopular student speech because, “America’s schools are the nurseries of democracy.” Freedom of Religion The First Amendment contains two provisions that protect citizens’s freedom of religion. The establishment clause maintains that government “shall make no law respecting an establishment of religion.” In the 1971 case Lemon v. Kurtzman, the U.S. Supreme Court codified the following three tests to determine whether a particular government statute violates the establishment clause: GLOBAL Context Digital Archive Japan/Alamy Stock Photo Free Speech in China The Chinese constitution does not guarantee freedom of speech or assembly, nor does it recognize any form of natural rights or human rights. Instead, it recognizes citizens’ rights, which are specifically enumerated in the Chinese constitution or laws. Not only does the Chinese constitution not provide protections for expressive activity, but numerous Chinese laws prohibit citizens from engaging in political acts directed against the regime—acts that are protected in the United States. For example, Article 25 of China’s Publishing Control Act prohibits the publication of any material that opposes the basic rules of the constitution. Articles 7 and 12 of the Law on Assemblies, Processions, and Demonstrations prohibit assemblies, processions, and demonstrations that oppose these basic rules. Does the statute have a secular legislative purpose? Does the statute’s principal or primary effect either advance or inhibit religion? Does the statute foster an excessive government entanglement with religion? To determine whether the statute fosters an excessive government entanglement with religion, courts examine the character and purposes of the institutions benefited, the nature of the aid that the government provides, and the

resulting relationship between the government and the religious authority. The continuing viability of the Lemon test has been continually questioned, and it has been heavily criticized in recent years, but it is still standing. The most recent challenge to the rule came in the 2019 case of American Leigon v. American Humanists Association, a 7-2 decision with seven separate opinions, that upheld the Constitutionality of a religious display of a 32-foot tall Latin cross. In his majority opinion, Justice Alito wrote that the test "presents particularly daunting problems" with respect to religious display cases. But in her concurring opinion, Justice Kagen praised the "test's focus on purposes and effects" as "crucial in evaluating government action in this sphere." So, st least for now, the test seems to be hanging on by a thin thread. The free-exercise clause states that government cannot make a law "prohibiting the free exercise" of religion. Although government must remain neutral in matters of religion, determining whether a government action advances religion or merely allows free exercise of religion is often difficult. Likewise, determining whether a government action establishes religion or simply avoids interference with free exercise of religion is also difficult. Page 100 Issues concerning the establishment clause and the free-exercise clause often arise in workplace settings. In government workplaces, this conflict sometimes raises difficult issues. For example, in 1966, Tucker, an employee of the California Department of Education, insisted on signing office memos with his name and the letters "SOTLJC," an abbreviation for "Servant of the Lord Jesus Christ." In an attempt to avoid workplace disruptions and the appearance of government support for religion, Tucker's supervisor prohibited all displays of religious symbols in the workplace. The supervisor suspended Tucker for refusing to comply with the restrictions. When Tucker challenged the suspension on grounds that the rules interfered with his free exercise of religion, the appellate court agreed. In 2014, free exercise of religion was in the headlines, as the U.S. Supreme Court heard another challenge to the Affordable Care Act (ACA). This challenge involved the requirement under the ACA that corporations provide health insurance coverage for certain types of contraception to their employees. The owners of Hobby Lobby, a closely held corporation, argued that complying with this regulation would place a burden on their sincerely held religious beliefs related to contraception, and thus violated the Religious Freedom Restoration Act of 1993 (RFRA), which provides that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."1 In resolving conflicting circuit court decisions on this issue, the U.S. Supreme Court, in Burwell v. Hobby Lobby,2 ruled that the regulations violated the RFRA, which prohibited the federal government from

taking any action that substantially burdened the exercise of religion unless it constituted the least restrictive means of serving a compelling government interest. The court concluded that the challenged regulations substantially burdened the exercise of religion because compliance was contrary to the owners' religious objections to abortion and there was a heavy financial penalty for noncompliance. Assuming that the regulations served a compelling government interest, the court found that they were not the least restrictive means of serving that interest because there were other ways to ensure that every woman had cost-free access to certain contraceptives. Two alternatives Justice Alito put forth were that the Government could assume the cost of providing the four contraceptives to women unable to obtain coverage due to their employers' religious objections, or it could extend the accommodation already established for religious nonprofit organizations to nonprofit employers with religious objections to the contraceptive mandate. Ultimately, a divided Supreme Court held that corporations have the right to free exercise of religion, and therefore the Court held that closely held, for-profit corporations are not required to provide certain forms of birth control mandated by the Affordable Care Act. In private workplaces, issues related to free exercise of religion most often arise under Title VII, the federal law prohibiting employment discrimination. We discuss this important legislation in detail in Chapter 24. The Fourth Amendment Freedom from Unreasonable Searches and Seizures The Fourth Amendment guarantees citizens the right to be "secure in their persons, their homes, and their personal property." Thus, it prohibits government from conducting unreasonable searches of individuals and seizing their property to use as evidence against them. Page 101 A search is unreasonable if the government official conducting the search does not first obtain a search warrant from a court. A search warrant is a court order that authorizes law enforcement agents to search for or seize items specifically described in the warrant. Government officials can obtain search warrants only if they can show probable cause to believe that the search will uncover specific evidence of criminal activity. In other words, the government officials must have a sufficient reason based on known facts to obtain a warrant. The Supreme Court has ruled, however, that in certain circumstances, government officials do not need a search warrant. For example, when law enforcement officials believe it is likely that the items sought will be removed before they can obtain a warrant, they may conduct a search without a warrant. Law enforcement officials frequently conduct automobile searches without a warrant according to this rule. In most other cases, though, law enforcement officials must obtain a warrant before conducting a search. For example, an Ohio law required buyers of five or

more beer kegs to provide the beer distributor with the address of the party where the kegs would be consumed. Additionally, the law required the buyers to sign a form allowing police and liquor agents to enter their property without a warrant to search the premises to enforce state liquor laws. In 2001, a college professor challenged the law on grounds that it infringed on citizens's Fourth Amendment rights. Before the court decided the case, Ohio repealed the law. Technological changes have raised interesting issues in the application of the Fourth Amendment. For example, because growing marijuana indoors requires heat lamps that use large amounts of electricity, when police found that a suspected marijuana grower had unusually high electric bills, they used an instrument that detects heat emissions to provide them with the evidence necessary to obtain a warrant to search his house physically. In determining whether using a thermal-imaging instrument on private property constituted an unlawful search, the Court asked whether using a thermal-imaging instrument is more like going through someone's garbage, which had been previously held not to violate the Fourth Amendment, or more like using a high-powered telescope to look through someone's window, which had been previously found to be a violation. In finding the use of this new technology more analogous to the latter type of search, the U.S. Supreme Court ruled that police use of thermal-imaging devices to detect heat patterns emanating from private homes constitutes a search that requires a warrant and further held that the warrant requirement applies also to any "more sophisticated systems" that give the police knowledge that in the past would have required physical entry of the home. Somewhat more recently, drug-sniffing dogs have had a surprisingly prominent role in the Supreme Court's holdings related to the Fourth Amendment. In the 2013 case of Florida v. Jardines,3 the high court held that bringing a drug-sniffing dog onto someone's front porch without a warrant violates the Fourth Amendment's protection against warrantless searches. Justice Scalia wrote that a person's minimal expectation of privacy extends not only to his house but to its immediate surroundings such as the porch. The outcome is somewhat different, however, if the drug-sniffing dog is accompanying an officer to a person's vehicle for a routine traffic stop. In Florida v. Harris,4 an officer made a routine traffic stop of a truck, and when he walked up to the vehicle with the drug-sniffing dog, the dog, through its behavior, indicated the presence of illegal drugs in the door of the truck. The officer treated the dog's behavior as giving him probable cause to search the interior of the door of the truck, where he subsequently found 200 pseudoephedrine pills and other methamphetamine precursors. In this case, the high court upheld the search. In 2014, the Fourth Amendment was again

interpreted by the high court in Case 5-3, as it addressed the issue of what limitations there should be on cell phone searches pursuant to an arrest. Page 102 CASE 5-3 DAVID LEON RILEY v. CALIFORNIA and UNITED STATES v. WURIE Supreme Court of the United States 134 S. Ct. 2473 (2014) FACTS: The case heard by the Supreme Court as Riley v. California was actually a combination of two cases, Riley v. California and United States v. Wurie. Both cases involved the seizure of a cell phone. Riley v. California began in 2009, when David Leon Riley was pulled over for expired registration tags on his car. It was then discovered that Riley's license had been suspended, which authorized impounding of Riley's car. Upon an immediate search of the vehicle, illegal weapons were found, and Riley was placed under arrest. The police then seized and searched Riley's phone without a warrant, and pictures and videos on the phone indicated that Riley was involved in a recent gang-related shooting. Police charged Riley in connection with the shooting. Riley moved to suppress the evidence that was found on his phone. In United States v. Wurie, Brima Wurie was arrested after police observed him participate in a drug sale. At the police station, two of Wurie's cell phones were confisticated. Information on the phones led police to search Wurie's home, where illegal drugs and weapons were found. Wurie was subsequently charged with drug and weapons offenses. Wurie moved to suppress the evidence that was found through the seizure of his phones. ISSUE: Was the evidence admitted at trial from Riley's and Wuries's cell phones discovered through a search that violated their Fourth Amendment right to be free from unreasonable searches? REASONING: While deciding how to rule on the case, the Court considered the precedent set by Chimel v. California, a 1969 Supreme Court case. In Chimel v. California, the Court ruled that if the police arrest someone, the officers may search the body of the person and "the area into which he might reach" without a warrant in order to protect material evidence or the officers' safety. In People v. Diaz, the California Supreme Court interpreted this precedent to mean that police could conduct a full search of a cell phone whenever the phone is found near the suspect at the time of arrest. Ultimately, however, the Court ruled in favor of Riley and Wurie. The Court argued that while protecting evidence and police officers is certainly important, there's no way the data stored on a phone can itself be used as a weapon to harm an officer or aid in an arrestee's escape. In his opinion, Chief Justice Roberts contended that while evidence stored on a phone may be destroyed through remote wiping or data encryption, these are basic security features of today's cell phones and a suspect could destroy any evidence long before the phone is actually searched. A warrantless search is unlikely to make much of a difference.

Chief Justice Roberts continued by arguing that today's cell phones hold huge amounts of personal information on "the privacies of life." Cell phones differ in both a quantitative and qualitative sense from most other objects that would be on someone's person at the time of arrest and therefore should not be subject to the search and seizure procedures allowed by Chimel v. California. DECISION: The warrantless seizure of a cell phone is a violation of the Fourth Amendment. Riley's and Wuries's requests to suppress evidence gathered from their cell phones were granted. SIGNIFICANCE: This case is an excellent example of the law adapting to changes in technology and society in order to preserve the rights of citizens in a new era. CRITICAL THINKING The court analogized between the search of a cell phone and the search of a house. How strong is this analogy? ETHICAL REASONING What ethical norm is furthered by this decision? What ethical norm is being sacrificed? Page 103 In addition to protecting individuals and their homes, the Fourth Amendment also protects corporations and places of business. This protection generally applies in criminal cases, but Fourth Amendment issues also arise when government regulations authorize administrative agencies to conduct warrantless searches. Although administrative searches usually require search warrants, courts have established an exception to this rule: If an industry has a long history of pervasive regulation, a warrantless search is not unreasonable. In such industries, administrative agencies can use warrantless searches to ensure that firms uphold regulations. This pervasive-regulation exception, however, is not always easy to interpret. Courts have ruled that warrantless searches authorized by the Federal Mine Safety and Health Act are legal because the federal regulatory presence is comprehensive and well defined. Thus, reasonable commercial-property owners ought to know that their property is subject to periodic inspections. A warrantless search based on the Occupational Safety and Health Act, however, may violate the Fourth Amendment because no significant legislation of working conditions existed before Congress passed that act in 1970. Hence, businesspeople covered by the law cannot reasonably anticipate warrantless searches. The Fifth Amendment The Fifth Amendment protects individuals in several important ways. First, it protects against self-incrimination, meaning that in a criminal case, the defendant does not have to testify in court as a witness against himself or herself. The Fifth Amendment also protects against double jeopardy. Thus, government cannot try a person more than once for the same crime. Due Process For businesspeople and corporations, the Fifth Amendment's due process clause provides extensive protection. This clause states that government cannot deprive a person of life, liberty, or property without due process of law. The

due process clause guarantees two types of due process: procedural and substantive. Procedural due process requires the government to use fair procedures when taking the life, liberty, or property of an individual or corporation. At a minimum, procedural due process entitles a person to notice of any legal action against her and to a hearing before an impartial tribunal. Originally, courts interpreted the due process clause as protecting an individual's right of procedural due process only in federal criminal proceedings. The subsequent passage of the Fourteenth Amendment extended the requirement of due process to criminal proceedings by state governments. Today, courts apply the due process clause to diverse situations, including the termination of welfare benefits, food stamps, or Social Security benefits; the suspension of a driver's license; the discharge of a public employee from his job; and the suspension of a student from school. The procedures that government must follow when taking an individual's life, liberty, or property vary according to the nature of the taking. Generally, more procedures are necessary as the magnitude of potential deprivation increases. CASE Nugget Can States Deny Same Sex Couples the Right to Marry? Obergefell et al. v. Hodges United States Supreme Court 135 U.S. 2584 (2015) One of the most awaited Supreme Court decisions in 2013 was United States v. Windsor, in which the high court struck down the Defense of Marriage Act (DOMA), an act providing that for purposes of all federal laws, a marriage must be between opposite sex partners. While this case brought significant relief to those whose states recognized their same-sex marriages, it did nothing to improve conditions for those whose states did not recognize same-sex marriage. Same-sex couples in the rest of the states would have to wait until the 2015 case of Obergefell v. Hodges to have their relationships recognized. The petitioners in this case were 14 same-sex couples and two men whose same-sex partners were deceased. All had filed suits in Federal District Courts in their home states, claiming that respondent state officials had violated the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another state given full recognition. Each District Court ruled in petitioners's favor, but the Sixth Circuit consolidated the cases and reversed. The U.S. Supreme Court then reversed the Sixth Circuit decision. In that decision, the high court ruled that under the due process and equal protection clauses of the Fourteenth Amendment, same-sex couples have a fundamental right to marry. And because same-sex couples can exercise the fundamental right to marry in all states, the court could find no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character. Laws of Michigan, Kentucky, Ohio, and Tennessee were

held invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. While many Americans celebrated the ruling, not everyone embraced the decision. For example, Kim Davis, a county clerk of Rowan County, Kentucky, made headlines in September 2015 when she refused to issue marriage licenses to same-sex couples, claiming that issuing marriage licenses to same-sex couples violated her beliefs. This ruling will have a significant impact on how businesses must now treat a significant number of employees, bringing them under the umbrella of several federal statutes. Page 104 Substantive due process refers to the basic fairness of laws that may deprive an individual of her life, liberty, or property. To satisfy the substantive due process requirement, government must have a proper purpose for enacting laws that restrict individuals's liberty or the use of their property. The standard for determining whether a law violates substantive due process depends on the nature of the potential deprivation. Laws affecting fundamental rights must bear a substantial relationship to a compelling government purpose. These fundamental rights generally include the rights protected in the Constitution: the right to vote, the right to travel freely from state to state, the right to privacy, and so on. Compelling state interests include, for example, public safety and national security. Not all laws, however, affect fundamental rights. To show that a law that does not affect fundamental rights satisfies the substantive due process requirement, government must prove only that the law bears a rational relationship to a legitimate state interest. Courts uphold most government regulations according to this rational-basis test. For example, courts have upheld minimum-wage laws, rent control laws, banking regulations, environmental laws, and regulations prohibiting unfair trade practices according to the rational-basis test. The Prohibition against Uncompensated Takings The Fifth Amendment provides that when government takes private property for public use, it must pay the owner just compensation, or fair market value, for her property. This provision is called the takings clause, and it applies to corporations. Several significant issues have arisen with respect to the takings clause. For example, what constitutes a public use for which government can take private property? This issue is explored in depth in Chapter 6. The takings clause has prompted other issues as well. What happens, for instance, when a government regulation interferes so substantially with an individual's use their property that it effectively takes the property? For example, environmental regulations often affect the way landowners can use their property. Under the case of Lucas v. South Carolina Coastal Commission, the Supreme Court held that if a regulation is so extensive that it leaves the property owner with no

economically viable use of the land, the regulation constitutes a taking, and the owner is entitled to compensation for the value of the property, even though the state did not seek to take title to the land. These so-called regulatory takings do not occur very frequently because most regulations merely limit the use one can make of their property, and limitations on use do not constitute takings. Page 105 The Privilege against Self-Incrimination Although most provisions of the Fifth Amendment apply to corporations, corporations do not enjoy the Fifth Amendment's protection against self-incrimination. Sole proprietors, however, are entitled to this protection. Thus, different businesses have different constitutional rights depending on their form of business organization. For example, in the 1988 U.S. Supreme Court case Braswell v. United States, the Court distinguished between the rights of corporate-record custodians and sole proprietors. Braswell was both the operator and the sole shareholder of his business. When a grand jury issued a subpoena requiring him to produce corporate books and records, Braswell argued that the subpoena violated his Fifth Amendment privilege against self-incrimination. The Court denied Braswell's claim, writing that "subpoenaed business records are not privileged, and as a custodian for the records, the act of producing the records is in a representative capacity, not a personal one, so the records must be produced." The Court held that the subpoena would have violated Braswell's privilege against self-incrimination if his business had been a sole proprietorship. The Ninth Amendment The Right to Privacy The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Athough this amendment does not expressly guarantee the right to privacy, in the 1965 case of Griswold v. Connecticut, the U.S. Supreme Court interpreted the Ninth Amendment, together with the First, Third, Fourth, and Fifth Amendments, as providing individuals with a right to privacy that protected the right to to obtain contraceptives. The right was subsequently recognized and reinforced in numerous court decisions, including Roe v. Wade5, the case that protected a womans right to abortion. In the 2022 case of Dobbs v. Jackson6, the high court appeared to abolish any recognition of a right to privacy by overturning Roe v. Wade. In his concurring opinion, Justice Thomas called on his colleagues to overturn other privacy related high court rulings protecting same sex marriage, gay sex and contraceptives. Any future protection for a right to privacy are uncertain at this time. The Fourteenth Amendment Equal Protection The Fourteenth Amendment contains the equal protection clause, which prevents states from denying "the equal protection of the laws" to any citizen. This clause combats discrimination because it applies whenever government treats

certain individuals differently than other similarly situated individuals, usually through a classification scheme. As with the due process clause, to determine whether a law violates the equal protection clause, courts use different standards based on the nature of the rights the classification affects. Three standards of scrutiny apply: strict scrutiny, intermediate scrutiny, and the rational-basis test. If a law prevents individuals from exercising a fundamental right, or if the law's classification scheme involves suspect classifications, the action will be subject to strict scrutiny. Suspect classifications include classifications based on race, national origin, and citizenship. Courts uphold suspect classifications only if they are necessary to promote a compelling state interest. In cases involving suspect classifications, courts do not begin their analysis with a presumption that the classification is constitutional, so few laws pass the strict-scrutiny standard. For example, in the 1954 case Brown v. Board of Education, the U.S. Supreme Court ruled that the classification scheme used to segregate public schools racially violated the equal protection clause. Page 106 Several courts have held, however, that in some cases, remedying past discrimination against a group is a compelling state interest. Chapter 24 discusses this issue in detail. If the law's classification scheme is based on gender or on the legitimacy of children, courts use intermediate scrutiny. According to this standard, the law is constitutional only if it is substantially related to an important government objective. When a classification scheme involves other matters, courts apply a rational-basis test. According to this test, courts ask whether there is any justifiable reason to believe that the classification scheme advances a legitimate government interest. Because courts begin their analysis with a strong presumption that the government action is constitutional, almost all laws pass this test. CASE OPENER WRAP-UP The Constitutionality of the Affordable Care Act In a decision that surprised many, the United States Supreme Court upheld the individual mandate of the Affordable Care Act (ACA). However, it did so on the ground that it was a valid exercise of congressional power under the taxing clause. The high court did not agree with the federal government's argument that the mandate was a lawful exercise of commerce clause authority. In rejecting this argument, Chief Justice Roberts said that the power to regulate presupposes the existence of the commercial activity to be regulated. The act was not regulating existing activity but, rather, was trying to require people to become active. Roberts feared that extending the reach of regulation under the commerce clause to individuals because they were doing nothing would open a new and potentially vast domain to congressional authority. He noted that the Constitution gave Congress the

authority to regulate commerce, not compel it. In her opinion, Justice Ginsburg disagreed with the chief justice's contention that the ACA was not a regulation of commerce. She pointed out that the uninsured are in fact very active in the market for health care services and that it is the legislature that should determine the borders of the market that it is attempting to regulate. She also pointed out that the high court has upheld the authority of Congress to direct the conduct of individuals today because of their prophesied conduct tomorrow, noting that as far back in the history of commerce clause interpretation as Wickard v. Filburn, the court upheld prohibiting a farmer's growing wheat for home consumption because in the future he might grow wheat for sale in the market. And in Raisch, home-grown marijuana could be regulated because at some point in the future, the price of marijuana in the market may lead the individual growing for home consumption to enter the market as a seller, just as the uninsured in the future might need medical care. And, in fact, the need for medical care at some future date is much more certain than entry in the market in either Filburn or Raisch. Because the high court upheld the constitutionality of the individual mandate, it did not have to address the issue of whether it was severable from the rest of the act. Just before this book went to press, Congress eliminated the individual mandate. Despite this change in the law, the analysis is still useful to our understanding of how the Commerce Clause is interpreted. Also, remember that one of the issues in the case was whether the individual mandate was integral to the functioning of the law. The court did not have to address that issue, but now, as the mandate has been removed, we will see by what happens to the law whether in fact this provision was integral to the functioning of the legislation. Page 107 PRACTICAL TIPS for Business Managers Remember that if an inspector from an administrative agency shows up to do a search of your business, you have the right to ask to see a warrant as long as your business in not in an industry that has a long history of pervasive regulation. Remember that while corporations enjoy most of the protections of the Bill of Rights, corporations do not have the Fifth Amendment right against self-incrimination, which means that corporate managers may be compelled to testify against the corporation. Because the courts have found that corporations have free speech rights, when a regulation limits your company's advertising, you always want to ask whether the regulation violates your firm's First Amendment right to free speech.

SUMMARY The U.S. Constitution Federalism: The authority to govern is divided between two sovereigns, or supreme lawmakers: the federal government and the states. Separation of powers: The Constitution divides power among the legislative, executive, and judicial branches of government. The system of checks and balances allocates specific powers to each branch to keep the other branches from dominating government. The Supremacy Clause and Federal Preemption Federal supremacy: Any state or local law that directly conflicts with the U.S. Constitution, federal laws, or treaties is void. Concurrent authority: Both state and federal governments have the power to regulate certain matters; generally, the federal government defers to the state. Federal preemption: The federal government uses this doctrine to strike down laws that do not directly conflict with a federal law but attempt to regulate an area within federal legislative jurisdiction. The Commerce Clause The commerce clause grants the federal government the authority to pass regulations that significantly affect interstate commerce. Today, this clause provides the basis for most federal government regulations. Police powers are the residual powers retained by states to pass laws to safeguard the health and welfare of their citizens. The dormant commerce clause prohibits states from passing laws that significantly interfere with interstate commerce. Taxing and Spending Powers of the Federal Government Congressional taxes must be uniform across all states. Congress can use taxes and spending for purposes other than generating revenue; for example, it can use them to indirectly promote social goals. Other Constitutional Restrictions on Government The privileges and immunities clause prohibits states from discriminating against citizens of other states. The full faith and credit clause states that in civil matters, courts in all states must uphold rights established by legal documents. The contract clause states that Congress cannot pass laws that unreasonably interfere with existing contracts. The Amendments to the Constitution First Amendment: Protects corporate speech in certain circumstances. It protects corporate political speech to the same extent that it protects individuals’s political speech. The Central Hudson test determines whether the First Amendment protects particular corporate commercial speech. Contains the establishment clause, which states that Congress may not make laws respecting an establishment of religion, and the free-exercise clause, which states that Congress may not make laws prohibiting the free exercise of religion. Fourth Amendment: Protects both corporations and individuals from unreasonable government searches and seizures. Although administrative searches generally require a warrant, administrative agencies may inspect some industries without a warrant to ensure compliance with industry

regulations. Fifth Amendment: States that government cannot take an individual’s life, liberty, or property without due process of law. There are two types of due process: procedural due process, which focuses on rules for enforcing laws and entitles individuals to notice of legal action against them, and substantive due process, which requires government to have a proper purpose for enacting laws that restrict individuals’s liberty or the use of their property. States that if government takes private property for public use, it must compensate the owner. The extent to which some government regulations constitute takings, however, generates much litigation. Includes a privilege against self-incrimination, although the provision does not apply to corporations. Only individual citizens and sole proprietorships may exercise this right. Guarantees individuals equal protection under the law. Courts use three standards of scrutiny in equal protection cases: (i) strict scrutiny, to analyze government actions that abridge fundamental rights or that include suspect classifications; (ii) intermediate scrutiny, to analyze classifications based on gender or on legitimacy of children; and (iii) the rational-basis test, to analyze classifications involving other matters. Ninth Amendment: Along with the First, Third, Fourth, and Fifth Amendments, this amendment provides individuals with a right to privacy. Fourteenth Amendment: Applies the due-process clause to state governments and contains the equal protection clause, which prohibits states from denying the equal protection of the laws to any citizens.

Point/Counterpoint Should Warrantless Wiretapping Be Allowed under the Fourth Amendment? YES NO Warrantless wiretapping differs from standard wiretapping procedures only in the lack of a court-ordered warrant. In matters of national security and cases in which secrecy is of paramount importance, the acquisition of intelligence information must come before the procedural formalities of the legal system. Valuable surveillance necessary for the protection of U.S. citizens is conducted by warrantless wiretapping and should not be prevented because of a lack of a warrant. The Internet has spawned an expanded realm of communications that creates new risks to national security. Technologies such as email, instant messaging, and websites allow individuals or nations to communicate in ways that are difficult to monitor in real time while still trying to obtain a warrant. Internet technology has accelerated the pace of communication, and the methods for surveillance must accelerate as well to match. Some terrorist attacks have

been planned not through traditional channels, for which it is reasonable to obtain warrants in advance, but through the Internet. New situations require new methods of surveillance. The events of recent years demand a reexamination of the traditional intent of the Fourth Amendment. The rise in terrorist attacks and the new dynamics of conflict have shifted the nature of the conflict from that of conflict between nations to that of conflict among factions within one nation or several. Traditional conceptions of how wiretapping was applied in a different time must be replaced to preserve the overall intent of the Fourth Amendment: to keep people “secure in their persons.” The Fourth Amendment was designed to protect the right to privacy of all U.S. citizens. Breaching that privacy without a court-ordered warrant sets a dangerous precedent for the powers given to the federal government. The act of wiretapping without a warrant from the court violates the separation of powers doctrine by placing full authority for search and seizure in the hands of the executive branch of the federal government. Moreover, the Internet has brought forth a wide array of additional methods of communication that can potentially be “wiretapped.” Email, instant messaging, websites, and other forms of electronic communication compound the problem by rendering private citizens even more vulnerable to surveillance by the federal government. Because electronic wiretaps are easier to obtain, monitor, and record than traditional wiretaps, the volume of information that the federal government can gather and use is significantly larger than it was before the advent of the Internet. Questions have been raised as to the efficacy of the warrantless wiretapping program. Since the program remains shrouded in secrecy, it is hard to demonstrate a reasonable benefit from the wiretapping. The program was initially designed for monitoring communications into and out of other countries, not within the borders of the United States. Nevertheless, the program has recently been applied to U.S. citizens communicating within U.S. borders. This marks a vast expansion of the power of the federal government regarding surveillance of the civilian population.

Questions & Problems Explain how each branch of the government checks the power of the other branches. How can both Sue and Sam be correct when Sue claims the commerce clause increases government’s power and Sam claims the commerce clause reduces government’s power? What is the purpose of the contract clause? How does the contract clause affect state

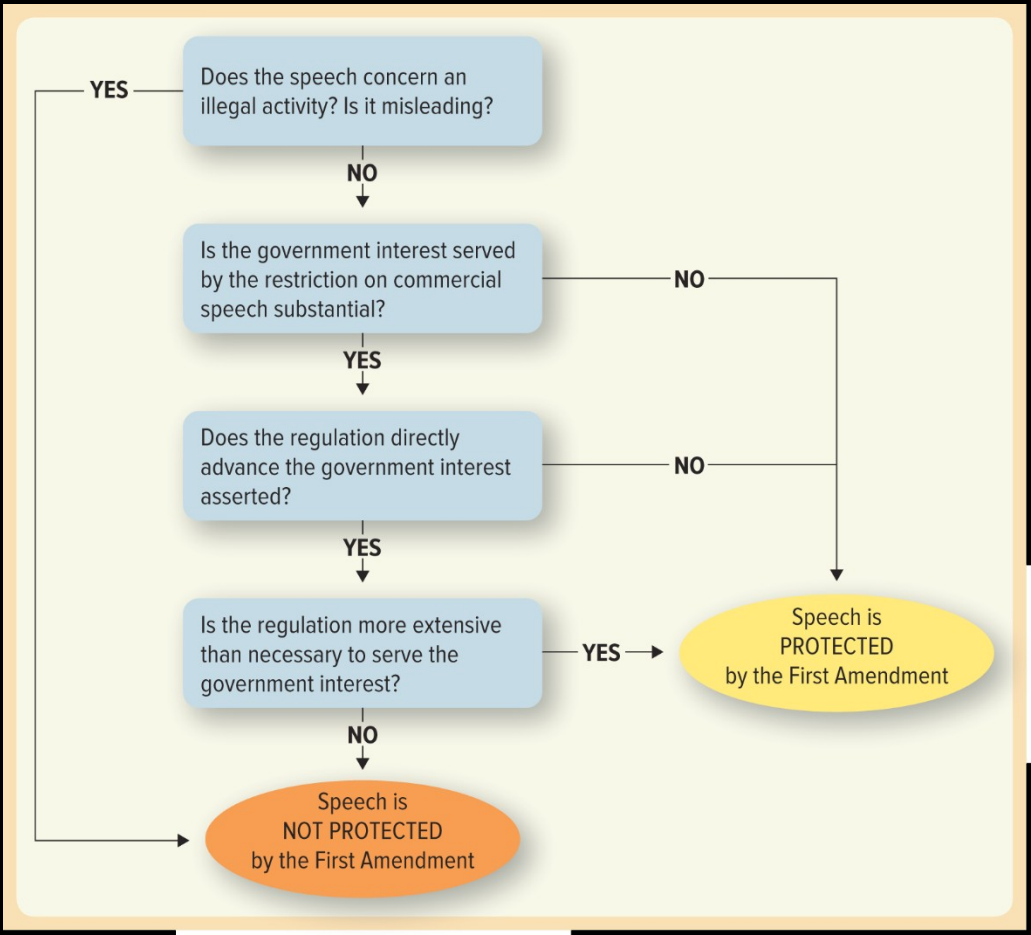
regulation? How does the First Amendment protection of corporate political speech differ from the protection of corporate commercial speech? Taxpayers in the state of Kentucky alleged that a tax on out-of-state municipal bonds that excluded interest from in-state bonds was a violation of the commerce clause. Representatives of the state argued that the tax reflected a traditional government function that could persist without any differential treatment of local interests against the similar interests of out-of-state entities. Additionally, because Kentucky itself participates in the bond market, its potential discrimination should be found allowable. How would you have ruled in this case? Why? Source: Department of Revenue of Kentucky v. George W. Davis, 553 U.S. 328 (2008). The town of Gilbert, Arizona, passed an ordinance that restricted the maximum size of a sign depending upon the content of the sign. Signs advertising political candidates were allowed to be as large as 32 square feet and could stay in place indefinitely, and signs that advertised general ideas were limited to 20 square feet and were also allowed to be placed indefinitely. However, signs that advertised church services and similar events were limited to six square feet, could only be displayed just before and after an event, and only four were allowed on a property at a time. Good News Community Church and its pastor, Clyde Reed, whose Sunday church services are held at various temporary locations in and near Gilbert, posted signs early each Saturday bearing the church's name and the time and location of the next service and did not remove the signs until around midday Sunday. The church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the town, petitioners filed suit, claiming that the town code abridged their freedom of speech. The district court denied their motion for a preliminary injunction, and the Ninth Circuit affirmed. The church appealed to the U.S. Supreme Court. How do you think the high court ruled in this case and why? Source: Reed v. Gilbert, Arizona, 135 S. Ct. 2218 (2015). Tennessee law imposes durational-residency requirements on persons and companies wishing to operate retail liquor stores, requiring applicants for an initial license to have resided in the state for the prior two years; requiring an applicant for renewal of a license to reside in the state for 10 consecutive years; and providing that a corporation cannot obtain a license unless all of its stockholders are residents. Following the state attorney general's opinion that the residency requirements discriminated against out-of-state economic interests in violation of the Commerce Clause, the Tennessee Alcoholic Beverage Commission (TABC) declined to enforce the requirements. Two businesses that did not meet the residency requirements, Total Wine and the

Ketchum family, applied for licenses to own and operate liquor stores in Tennessee. Tennessee Wine and Spirits Retailers Association (Association)—a trade association of in-state liquor stores—threatened to sue the TABC if it granted the licenses, so the TABC's executive director filed a declaratory judgment action in state court to settle the question of the residency requirements' constitutionality. The two businesses applying for licenses argue that the restriction violated the dormant Commerce Clause. What do you think of that argument? Source: Tennessee Wine and Spirits Retailers Assn. v. Thomas, 883 F.3d 608 (2019). Page 110 David Milam, a member of the Delta Tau Delta fraternity at the University of Kentucky, had leased a room at the fraternity house. University of Kentucky Police Detective John McBride received a tip that Milam was selling marijuana at the fraternity house, so with two other university police detectives, he went to the house to perform a "knock and talk" investigation. The detectives did not have a warrant to search the house. Upon arriving, the officers went to the back door, believing it was the front door. No one responded to their knocking and ringing the bell several times. Deciding that the fraternity house was more similar to an apartment complex than a private residence, they opened the unlocked and slightly ajar door and entered into the foyer, where they announced their presence. Shortly thereafter, another member of the fraternity, Neagli, entered the foyer area from an adjoining room. Without asking him who he was or whether he was affiliated with the fraternity, the detectives identified themselves as police officers and said that they were looking for Milam. After a brief conversation, the detectives followed Neagli up the stairs to the second floor where the individual rooms were located. Once in the stairwell, the detectives could smell burnt marijuana. At the top of the stairwell, Neagli opened the door to the second floor. Neagli identified Milam's room by pointing, and the detectives then knocked on the door. Milam opened the door, revealing the strong smell of marijuana. A full jar of marijuana was sitting on the coffee table inside the room, in plain view of the detectives. Milam then consented to the detectives' searching his bedroom. During the search, they discovered marijuana, $1,700, Adderall pills, drug paraphernalia, and a fake driver's license. Milam was charged with one count of trafficking in a controlled substance within 1,000 yards of a school, third-degree possession of a controlled substance, possession of drug paraphernalia, and second-degree criminal possession of a forged instrument. In the trial court, Milam argued that the detectives unlawfully entered and searched the house in violation of the Fourth Amendment. Several suppression hearings were held. Ultimately, the trial court denied Milam's motion to suppress the evidence discovered in his bedroom.

Thereafter, Milam entered a conditional guilty plea conditioned on the appeal of the denial of his suppression motion. Pursuant to that agreement, Appellant pled guilty to the trafficking charge and was sentenced to one year imprisonment and three years' probation. The Court of Appeals affirmed the trial court's denial of Milam's motion to suppress. Milam appealed again. How do you believe the Kentucky State Supreme Court ruled and why? Be sure to consider the Fourth Amendment in your reasoning. Source: Milam v. Commonwealth of Kentucky, 2015 Ky. LEXIS 1617, May 14, 2015. Members of the Old Order Groffdale Conference Mennonite Church have traditionally used horses and buggies for transportation. They began using tractors about 40 years ago, especially for hauling their agricultural products to market. To ensure that the tractors are not used to displace horses and buggies, the Order requires steel cleats that slow the speed of the tractors to be attached to the wheels of all tractors driven by church members. To minimize damage to the road from these cleats, the Order made them larger and mounted them on rubber belts, but in 2009, after determining that the cleats were damaging newly resurfaced roads, Mitchell County passed an ordinance providing that, "No tire on a vehicle moved on a highway is allowed to have any block, stud, flange, cleat or spike or any other protuberances of any material other than rubber." Zimmerman, a Mennonite, continued to operate his tractor on the road with the steel cleats attached to the tires and was cited for violating the ordinance. Zimmerman filed a motion to dismiss the charges on grounds that the law violated his First Amendment right to free exercise of religion, and the trial court denied his motion. How do you think the state's supreme court should have decided the appeal, and why? Source: Mitchell County v. Zimmerman, 810 NW 2d 1 (2012). On September 8, 2011, John Barth purchased a piece of property at 4 Lynn Street in Peabody, Massachusetts, for $1,000. Barth subsequently requested the City of Peabody for a variance to exempt his property from the local zoning ordinance. The City of Peabody's Zoning Board of Appeals held a public hearing and later voted to deny the variance. Following the refusal, Barth filed a pro se complaint alleging 23 "violations of law." Of the many claims Barth made, he specifically argued that the denial of his zoning variance request constituted a violation of the Fifth Amendment's Taking Clause. Barth contended that the denial amounted to a taking because it deprived him of the use and enjoyment of the land. Do you think the denial of the variance could legally be considered a taking? Source: Barth v. City of Peabody, U.S. Dist. LEXIS 4080 (2017). Page 111 In 2010, a North Carolina state court dismissed a traffic ticket against Lester Gerard Packingham. Elated by the favorable outcome, Packingham posted a note on his Facebook profile,

writing “Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . Praise be to GOD, WOW! Thanks JESUS!” Shortly after this post, Packingham was arrested. He was arrested for violating section 14-202.5, a statute that made it a felony for a registered sex offender to post to a social networking website known by the sex offender to permit children to maintain personal profiles. Packingham had been on the sex offender registry since 2001. At the time Packingham wrote his Facebook post, a member of the Durham Police Department was investigating possible violations of section 14-202.5. The investigating officer obtained a search warrant and discovered evidence that Packingham had indeed violated section 14-202.5. Packingham was indicted by a grand jury and eventually convicted by a trial court and given a suspended prison sentence. The state never alleged that Packingham had engaged in illicit contact with a minor during the trial or sentencing. Packingham appealed to the North Carolina court of appeals, arguing that the North Carolina Law was unconstitutional because it infringed his First Amendment rights. The appeals court accepted Packingham’s argument and the decision was reversed. However, the North Carolina Supreme Court reversed the appellate court. Packingham appealed to the United States Supreme Court. Do you think limiting access to social networking websites such as Facebook infringes a person’s First Amendment rights? How do you think the Supreme Court have decided this case? Why? Source: Packingham v. North Carolina, 137 S. Ct. 1730 (2017). Defendant was stopped by police inside the parking garage underneath his apartment building and subsequently arrested for operating while intoxicated. Defendant filed a motion to suppress, arguing that his Fourth Amendment rights were violated because the officers’s conduct occurred during a warrantless entry into a constitutionally protected area—the curtilage of his home. The trial court denied the motion to suppress, and the court of appeals affirmed. How do you think the Wisconsin Supreme Court ruled and why? Source: State v. Dumstrey, 2016 WI (Wis. Sup. Ct. 2016). In 2015, the city of San Francisco enacted an ordinance that required health warnings on advertisements for certain sugar-sweetened beverages (SSBs) that read: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.” The message was to be included on any billboard, poster, vehicle, or similar public medium that advertised a SSB. The city’s stated purpose for requiring the warning was “to inform the public of the presence of added sugars and thus promote informed consumer choice that may result in reduced caloric intake and improved diet and health, thereby reducing illnesses to which

SSBs contribute and associated economic burdens. The American Beverage Association, a trade association representing SSB producers, sued the city to prevent the implementation of the ordinance. On what grounds did the plaintiffs sue? How did the court rule? Source: American Beverage Assoc. v. City and County of San Francisco, No. 16-16072 (9th Cir. 2019).


Does the speech concern an illegal activity? Is it misleading?
YES
NO
Is the government interest served by the restriction on commercial speech substantial?
NO
YES
Does the regulation directly advance the government interest asserted?
NO
YES
Is the regulation more extensive than necessary to serve the government interest?
YES
Speech is PROTECTED by the First Amendment
NO
Speech is NOT PROTECTED by the First Amendment